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THE JOURNEY FROM *Ex Parte Crow Dog* TO *Littlechief*: A SURVEY OF TRIBAL CIVIL AND CRIMINAL JURISDICTION IN WESTERN OKLAHOMA

F. Browning Pipestem *

Under the provisions of Public Law 83-280 it appears therefore that the State of Oklahoma could have unilaterally assumed jurisdiction over any "Indian country" within its borders at any time between 1953 and 1968 had the Oklahoma Constitution been amended as required. After the enactment of Title IV in 1968 Oklahoma had to amend its constitution *and* the affected tribes had to consent to the State's assumption of jurisdiction over them before the State could acquire jurisdiction over "Indian country."

—Honorable Fred Daugherty, *United States of America v. Brock Kenyon Little Chief*,
No. CR-76-207-D, Nov. 7, 1977

Thereafter, a motion to dismiss said information was filed and a hearing held thereon on August 10, 1976, at the conclusion of which the court sustained the motion to dismiss, finding as he did so that the lands upon which the homicide occurred were within lands defined as Indian Land, and that the State of Oklahoma was without jurisdiction to prosecute the defendant. Thereafter, the State of Oklahoma filed an appeal with this Court

We find that the issue sought to be raised has been determined by the Honorable Fred Daugherty, and that said determination is binding on the State of Oklahoma since it involves the construction and application of Federal Statutes

— *State v. Littlechief*, No. 0-77-107,
Oklahoma Court of Criminal Appeals,

Jan. 4, 1978

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Introduction

In accordance with the provisions of Section 14 of the Indian Appropriation Act of 1889,¹ Lucius Fairchild, J.R. Hartranft, and A.H. Wilson were appointed by the President as a commission to "negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands." This commission's primary purpose was to secure title to the area known as the Cherokee Outlet and secondarily to negotiate with other Indian tribes. Thus, the commission was referred to generally as the Cherokee Commission. Later, with the addition of Mr. Jerome, this commission would be known more familiarly to the western Oklahoma Indian tribes as the Jerome Commission.

Beginning in 1890, the Jerome Commission, through a series of "allotment agreements" consummated with the Indian tribes in western Oklahoma, except for the Kaw, Otoe-Missouria, and Ponca Tribes, secured for the United States the cession of vast acreages of land within the original boundaries of tribal reservations, subject to allotments of land to individual members of the affected tribes in addition to reservations of specific tracts of land for tribal or federal uses.

The judicial and administrative treatment of the legal aftermath of this allotment and cession policy executed by the Jerome Commission and the major federal enactments such as the Dawes Act (General Allotment Act of 1887); the Oklahoma Organic Act of May 2, 1890, creating the Oklahoma Territory; the Burke Act of May 8, 1906, amending the General Allotment Act; the Oklahoma Enabling Act of June 16, 1906; the Indian Reorganization Act of 1934; the Oklahoma Indian Welfare Act of 1936; Section 1151 of Title 18 of the United States Code, defining Indian country; Public Law 280, relating to assumption of civil and criminal jurisdiction over Indian country by the states; and the Indian Civil Rights Act of 1968, as they bear upon the issue of tribal civil and criminal jurisdiction in western Oklahoma, is the subject of this article.

As was stated in *McClanahan v. Arizona Tax Commission*,² it may be helpful to begin this discussion of the law applicable to this complex area with a brief statement of what this survey of tribal jurisdiction in western Oklahoma does not involve. Justice Mar-

1. 25 Stat. 1005 (1889).

2. 411 U.S. 164 (1973).

shall, speaking for the Court, declared: "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government."

All of the Indian tribes in western Oklahoma possess the usual accoutrements of tribal self-government consistent with the Indian sovereignty principles enunciated in *Worcester v. Georgia*.³ No federal law has abolished any of the ordinary attributes of sovereignty of the above referenced federally recognized Indian tribes. As long as the Indian tribes in western Oklahoma maintain tribal relations (federal recognition), the Indian customs and laws control the internal affairs of the various tribes until Congress expressly directs otherwise. Section 12 of the Oklahoma Organic Act⁴ expressly recognizes these tribal powers.

The 1890 date is critical in that from 1890 forward several different statutory schemes for the different tribal groups in Oklahoma become evident. Consideration of the comprehensive statutory treatment of these tribes is not material here except to point out that a separate and special statutory arrangement emerges for those other tribes which occupied the Indian Territory and the tribes we will refer to as the Indian tribes in western Oklahoma.

In discussing the legal status of the various Indian tribes in Oklahoma, the *Handbook of Federal Indian Law*, in the 1958 revised edition at pp. 985-86, describes the situation in the following manner:

It must be recognized that in many respects the statutes and legal principles discussed in other chapters of this work as generally applicable to Indians of the United States, also apply to Oklahoma Indians, while in other respects Oklahoma Indians, or certain groups thereof, are excluded from the scope of such statutes and legal principles.

And, further, at pp. 986-87, the treatise points out the counter-productive impreciseness in referring to the many Indian tribes in Oklahoma as the "Oklahoma tribes," by stating:

Reference is sometimes made to the Five Civilized Tribes (the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles), and the Osages, as if they were the only tribes resident in the State of Oklahoma. In fact, the Indian tribes residing in the State include also the Cheyenne, Arapaho,

3. 31 U.S. (6 Pet.) 515 (1832).

4. Act of May 2, 1890 (26 Stat. 81).

Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Kaw, Otoe, Tonkawa, Pawnee, Peoria, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi and others.

Many general statutes are expressly made inapplicable to the Five Civilized Tribes or the Osages or to these nations and the Osages or to all tribes in Oklahoma. Congress has passed many special laws for Oklahoma tribes, especially for the Five Civilized Tribes and the Osages.

The recognition the more well-known Oklahoma tribes have received and their legal status has served to obscure the substantive legal distinctions between those tribes and the tribes occupying the western part of the state of Oklahoma. Whereas, the Five Civilized Tribes and Osages have generally been the subject of special congressional treatment, the Indians in western Oklahoma, with the single exception of the exclusion from certain portions of the 1934 Wheeler-Howard Act commonly referred to as the Indian Reorganization Act, have been included in the general drift of federal legislation affecting Indians nationwide.

The misplaced reliance on the impreciseness of the term "Oklahoma Indians" and the distinction between various tribal groups in Oklahoma is illustrated in the following quotation from *Oklahoma Tax Commission v. United States*:

The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia*, and, unlike the Indians involved in *The Kansas Indians* case, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions. Their lands are held in fee, not in trust, as in the *Rickert* case, and the doctrine of constitutional immunity from taxation for the income of their holdings on the federal instrumentality theory has been renounced . . . [Citations omitted.]⁵

The questions in *Oklahoma Tax Commission v. United States* involved the validity of the state inheritance tax on the estates of three members of the Five Civilized Tribes. The term "Oklahoma Indians" has no validity in law; there is no "Oklahoma Indians" tribe. Additionally, the foundation decision relating to tribal

5. 319 U.S. 598, 603 (1942).

sovereignty is *Worcester v. Georgia* construing the powers of the Cherokee Nation, one of the Five Civilized Tribes mentioned by Justice Black. One of the tribes then constituting *The Kansas Indians* is the present Absentee Shawnee Tribe, and the *Rickert* case involves the Sisseton-Wahpeton Sioux Tribe in South Dakota, a tribe whose legal status bears relevance to the tribes in western Oklahoma.

The April 1976 United Indian Tribes of Western Oklahoma and Kansas Position Paper commented on this subject in the following manner:

The impurity of definition regarding the legal character of American Indian tribal governments in Western Oklahoma and the prevailing federal policy denying our tribal entities a just measure of tribal sovereignty have created a state of relative legal chaos that in general frustrates the development of effective self-government and categorically disenfranchises our tribal governments from eligibility for a number of extremely beneficial federal programs.

The confusion about tribal legal status and the deleterious effect of this confusion on tribal jurisdiction is amply illustrated in the following quotation from a 1953 letter by Johnston Murray, Governor of Oklahoma, replying to a suggestion from Assistant Secretary of the Interior Orme Lewis that the state of Oklahoma meet with its Indian tribes in reference to Oklahoma assuming civil and criminal jurisdiction over Indian country in the state. Governor Murray stated:

When Oklahoma became a State, all tribal governments within its boundaries became merged in the State and the tribal codes under which the tribes were governed prior to statehood were abandoned and all Indian tribes, with respect to criminal offense and civil causes, came under State jurisdiction.

Therefore, Public Law No. 280 will not in any way affect the Indian citizens of this State.

In contrast, an August 17, 1942, letter from the Department of the Interior to the Attorney General of the United States regarding jurisdiction in the Oklahoma Territory concluded as follows:

In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible

exception of crimes committed by Indians against non-member Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law

It is significant to note that in spite of the conclusion supporting tribal jurisdiction, no affirmative steps were taken to implement the tribal authority. These radically different conclusions represent both the complexity and obscurity of matters involving the allocation of jurisdiction over Indian country in that part of Oklahoma that was Oklahoma Territory between federal, state and tribal authorities. In general, the state has assumed that no tribal jurisdiction exists; the federal authorities vacillate; and the Indian tribes are caught between the denial and the vacillation in a reactionary posture without the means to take the initiative.

The complexity and confusion submerging tribal jurisdiction in Oklahoma has led to several *erroneous* assumptions about tribal rights:

1. That, by agreeing to the allotment of their reservations, the tribes also gave up heretofore legally recognized tribal sovereignty.
2. That, by accepting individual allotments, tribal members no longer retained their federal trust status and became assimilated into the general community and thereby under the jurisdiction of Oklahoma.
3. That Indian country jurisdiction was confined to Indian reservations and, therefore, jurisdiction over Indian allotments and tribal land fell exclusively to the state authorities.

Because tribal and federal jurisdiction is exercised within the limits of Indian country as categorically defined in Section 1151 of Title 18 of the United States Code, the existence, diminishment, or disestablishment of the reservation boundaries bears a direct relationship to the territorial extent of Indian country in western

Oklahoma. In terms of the existence or nonexistence of reservation status, only the boundaries of the Ponca and Otoe-Missouria Indian reservations have been expressly mentioned and disestablished by federal statute. In pre-1962 decisions, the boundaries of three other reservations—the Kickapoo, the Kiowa, Comanche and Apache, and the Cheyenne-Arapaho—have been judicially determined to be disestablished. The 1962 date is important because in that year the United States Supreme Court enunciated new analytical standards for determining whether reservation boundaries have been extinguished different from those applied in the pre-1962 decisions affecting Indian reservations in Oklahoma. As a result of these decisions, a *de facto* administrative denial of reservation status for the balance of tribes in western Oklahoma has occurred. One of the pre-1962 decisions is presently being challenged in the federal courts by the Cheyenne and Arapaho tribes in *Cheyenne-Arapaho Tribes v. State*.⁶

At least two tribes, the Iowa and the Sac and Fox, on the face of their allotment agreements and applying the post-1962 standards for finding disestablishment, have an apparent case clear enough to justify an administrative finding that their reservations were diminished rather than totally disestablished. As to the status of the original reservation boundaries, these two tribes in all likelihood stand on the same footing with the other tribes.

At least one other group of tribes, the Kiowa, Comanche and Apache, have a two-tiered inquiry into their reservation status. There is one inquiry to determine if the pre-1962 *Tooisgah* decision is correct in light of the post-1962 Supreme Court standards, and another inquiry into the status of the 480,000-acre area reserved for tribal pasture purposes out of the cession considered in *Tooisgah*.

It is clear that the complexity of issues involved in the ultimate resolution of the reservation boundary questions will require litigation such as that initiated by the Cheyenne-Arapaho tribes.

Pending clarification of the reservation boundary issues in the Cheyenne-Arapaho case and assuming, for argument purposes only, that the original reservation boundaries of the various Indian reservations have been disestablished, the pertinent questions become:

6. No. CIV-75-0769-D (W.D. Okla. 1978) A final decision in this case will clarify the jurisdictional status of the Cheyenne and Arapaho Reservation, and provide substantive standards for other tribes similarly situated. The district court held that the Cheyenne and Arapaho Reservation had been disestablished and the case is now on appeal to the Tenth Circuit.

—Has the Congress by any legislative enactment expressly extinguished tribal civil and criminal jurisdictional powers in western Oklahoma?

—Does Indian country exist for federal and tribal jurisdictional purposes in western Oklahoma?

—Has the Congress granted the state of Oklahoma civil and criminal jurisdiction over Indian country in western Oklahoma?

A Statutory Review: 1890-1968

The judicial and administrative treatment of the legal aftermath of the allotment and cession policy executed by the Jerome Commission, and the major federal enactments, such as the Dawes Act,⁷ the Oklahoma Organic Act⁸ creating the Oklahoma Territory, the Burke Act⁹ amending the General Allotment Act, the Oklahoma Enabling Act,¹⁰ the Indian Reorganization Act,¹¹ the Oklahoma Indian Welfare Act,¹² Section 1151 of Title 18 of the United States Code defining Indian country, Public Law 280¹³ relating to assumption of civil and criminal jurisdiction over Indian country by states, and the Indian Civil Rights Act of 1968,¹⁴ as they bear upon the issue of tribal authority to enact and enforce civil and criminal codes in western Oklahoma, is the subject of consideration in this section of the article.

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished*.¹⁵ This principle, derived from the recognition of Indian tribes as "distinct, independent, political communities,"¹⁶ has resulted in a judicial doctrine recognizing that treaties and statutes of Congress are to be examined for express recognition or limitation of those powers.

7. General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

8. Oklahoma Organic Act of May 2, 1890, 26 Stat. 81.

9. Act of May 8, 1906, 34 Stat. 182.

10. Act of June 16, 1906, 34 Stat. 267.

11. Act of June 18, 1934, 48 Stat. 984.

12. Act of June 26, 1936, 49 Stat. 1967.

13. Pub. L. No. 83-280, Act of Aug. 15, 1953, 67 Stat. 589, *as amended*, 18 U.S.C. §§ 1151, 1162 (1970).

14. Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301-1303 (1970).

15. F. COHEN, *FEDERAL INDIAN LAW* 122 (U.S.G.P.O. 1942), *reprinted* (1971) [hereinafter cited as COHEN]. The United States Supreme Court described Cohen as "an acknowledged expert in Indian law." *Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956).

16. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832).

An illustration of these points is contained in the Act of June 28, 1898,¹⁷ popularly referred to as the Curtis Act, wherein the Congress sets forth the manner in which tribal powers are expressly limited. Section 28 of that Act, speaking to the tribal authority of those tribes within the Indian Territory to establish and maintain tribal courts, provides:

That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit.

In a previous section, Section 26, the Congress rendered the tribal laws unenforceable in the United States courts, stating that "on or after the passage of this Act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." Another substantive inherent tribal power—the power to tax—was abolished for all of the major Indian Territory tribes in the Act of April 26, 1906.¹⁸

No like legislative limitations were enacted for the Indian tribes in Oklahoma Territory, leading to the conclusion that Congress did not intend to accomplish a similar diminution of tribal powers in the Oklahoma Territory.

A detailed examination of the allotment statutes and allotment agreements ratified by Congress relating to the western Oklahoma tribes (Absentee Shawnee and Citizen Band Potawatomi,¹⁹ Cheyenne and Arapaho,²⁰ Iowa,²¹ Kansas or Kaw,²² Kickapoo,²³ Kiowa, Comanche, and Apache,²⁴ Otoe and Missouria,²⁵ Ponca,²⁶

17. 30 Stat. 495 (1898).

18. 34 Stat. 137 (1906).

19. Act of Mar. 3, 1891, 25 Stat. 1016, 1019.

20. Act of Mar. 3, 1891, 26 Stat. 989.

21. Act of Feb. 18, 1891, 26 Stat. 753.

22. Act of July 1, 1902, 32 Stat. 636.

23. Act of Mar. 3, 1893, 27 Stat. 557.

24. Act of June 6, 1900, 31 Stat. 676.

25. General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

26. *Id.*; Act of Apr. 21, 1904, 33 Stat. 217.

Sac and Fox,²⁷ Tonkawa,²⁸ Wichita and Affiliated Bands,²⁹) reveals no express provision for the termination of legislative authority exercised by tribal legislative bodies, generally known as tribal councils, and cannot be construed as limitations on tribal governments.³⁰ This view of the basis of tribal authority is only an application of the general principle that "it is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror."³¹

It is clear from the Supreme Court's decision in *Ex parte Crow Dog*³² that prior to 1885 Indian tribal jurisdiction, whether they exercised their jurisdictional powers through written codes and constitutions or by tradition, was plenary. In *Crow Dog*, the court held that the murder of Spotted Tail, a Sioux Indian, within Indian country, by Crow Dog, another Sioux Indian, was an offense exclusively within the jurisdiction of the tribe to the exclusion of the territorial or federal courts. It would follow from this decision that this offense and all lesser offenses committed within Indian country by Indians under the sovereignty of a particular Indian tribe would similarly be exclusively vested in that tribe. There are no apparent reasons that this holding should not apply to all of the Indian tribes in western Oklahoma.

The aftermath of *Crow Dog* presents the first major limitation on tribal jurisdictional powers. Spotted Tail was a famous Sioux chief and the hue and cry that arose when it was determined that traditional Sioux law, even on murder, was remedial rather than punitive resulted in the Congress passing the Major Crimes Act,³³ taking seven major crimes out of the tribal jurisdiction and exclusively vesting the federal courts with criminal jurisdiction over these crimes. The list of crimes was later expanded to ten and now includes fourteen offenses, which in general are the major felonies. The Major Crimes Act is presently codified in Sections 1153 and 3242 of Title 18 of the United States Code.

Indian tribes, then, remained vested with exclusive jurisdiction over the offenses which were not specifically vested in the federal courts by Congress. In other words, what was not taken by Congress remained in the tribes. The states occupied no meaningful position in this jurisdictional arrangement.

27. Agreement of Feb. 13, 1891, 26 Stat. 749.

28. Act of Mar. 3, 1893, 27 Stat. 643.

29. Act of Mar. 2, 1895, 28 Stat. 895.

30. Solicitor's Opinion, M-36783 (1969).

31. *Wall v. Williamson*, 8 Ala. 48, 51 (1845).

32. 109 U.S. 556 (1883).

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

Cohen has expressed the status of tribal authority as follows:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: 1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. 2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe (except those recognized by Congress such as the power to make war, or to treat with the United States), e.g. its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. 3) These powers are subject to qualification by treaties and by express legislation of Congress. But, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.³⁴

It follows, then, that once a tribe has entered into a treaty relationship with the United States, the Indian tribe is recognized by United States law as a governmental unit possessed of all internal powers not expressly qualified by Congress.³⁵ By the year 1890, the tribes occupying what was to become Oklahoma Territory were possessed of fundamental powers of self-government with their control over internal affairs limited only by the provisions of the Major Crimes Act. Included among those powers of internal sovereignty is the power to establish legislatures, usually called tribal councils,³⁶ the power to establish tribal courts,³⁷ the power to tax,³⁸ the power to grant marriages and divorces,³⁹ the power to provide for adoptions and guardianships,⁴⁰ the power to regulate hunting and fishing,⁴¹ the power to control economic development through zoning regulations and other land-use planning devices,⁴² the power to administer justice with respect to all disputes and offenses of or among members of the tribe, other than jurisdiction

34. COHEN, *supra* note 15, at 123.

35. *See* *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 78, 91, 92 (8th Cir. 1956), and cases cited therein.

36. *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

37. *Williams v. Lee*, 358 U.S. 217 (1959).

38. *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958).

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

40. *Fisher v. District Ct.*, 424 U.S. 382 (1976).

41. *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976).

42. *Santa Rosa Band of Indians v. Kings County*, 516 F.2d 924 (9th Cir. 1975).

over crimes reserved to the federal courts⁴³ or which may have been transferred to the state pursuant to Public Law 280.⁴⁴

Indian tribes in western Oklahoma have been referred to as part of a conglomerated mass, "Oklahoma Indian tribes," for several decades, and the negative connotation of "Oklahoma Indian tribes" in terms of tribal sovereignty makes analysis and communication on these matters difficult because of the common acceptance of the category, even though there is no legal reason for lumping all Indian tribes in Oklahoma into one legal category. From an extensive review of existing statutory authority, there is no compelling reason to reach a conclusion that the internal sovereignty or the jurisdiction vested thereby in the tribes now residing in western Oklahoma was generically different from any other Indian tribe. The same statement would be true for any of the other attributes of Indian sovereignty—the power to determine the form of government, to tax, to determine tribal membership, and to regulate the use of property.

The Act of March 1, 1889,⁴⁵ creating a United States court in the Indian Territory (which embraced the twelve reservations under consideration here), did no violence to tribal sovereignty or its concomitant civil and criminal jurisdiction. In fact, Sections 6 and 27 carefully preserved tribal jurisdiction. The Act makes specific references to offenses committed within the Indian Territory as offenses committed in Indian country.

Therefore, the statutes passed by Congress applicable to the tribes in western Oklahoma are herein examined to determine the sources of limitation on tribal powers. What is not expressly limited remains within the domain of tribal sovereignty. The pertinent questions then become:

(1) Has the Congress by any legislative enactment expressly extinguished tribal civil and criminal jurisdictional powers in western Oklahoma?

(2) Has the Congress granted the state of Oklahoma civil and criminal jurisdiction over Indian country in western Oklahoma?

Dawes Severalty Act

In 1887, the General Allotment Act (Dawes Act or Dawes Severalty Act)⁴⁶ was passed, authorizing the allotment of tribal

43. Solicitor's Opinion, 55 I.D. 15 (1934).

44. Pub. L. 83-280, Act of Aug. 15, 1953, 67 Stat. 589, *as amended*, 18 U.S.C. § 1162 and 28 U.S.C. § 1360. *See also* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 78 (8th Cir 1956).

45. Act of Mar. 1, 1889, 25 Stat. 783.

46. Act of Feb. 8, 1887, 24 Stat. 338, *as amended* by Burke Act of May 18, 1906).

lands to individual Indians or families. The allotment, or assimilation period, in federal Indian law had begun in earnest.

The termination of the treaty relationship cleared the way—or seemed to clear the way—for destroying the separate status of the Indians in the United States. No longer able to contest the will of the white man, as expressed through the dictates of the Congress, the Indian waited to see what the new era would bring. He had not long to wait. A massive drive towards “severalty”—the breaking up of tribal lands into individual units for distribution to the members of the tribe—began which culminated in the Dawes Severalty Act of 1887.⁴⁷

The desire to open more land for settlement was undoubtedly the primary motive for assimilation. However, the reformers, the friends of the Indians, pushed for the Dawes Act for several other reasons. They felt assimilation would replace tribal culture with the preferred white civilization, and Indians on Indian allotments would be easier to protect against railroad expansion and unscrupulous whites (erroneously as it has turned out). The annual report for the Board of Indian Commissioners for 1888 said the Dawes Act “gives to the Indian the possibility to become a man instead of remaining a ward of the government.” There was some official opposition to the law. Senator Teller of Colorado declared with considerable accuracy,

You propose to divide all this land and give each Indian his quarter section, or whatever he may have, and for twenty-five years he is not to sell it, mortgage it, or dispose of it in any shape, and at the end of that time he may sell it. It is safe to predict that when that shall have been done, in thirty years thereafter there will not be an Indian on the continent, or there will be very few at least, that will have any land⁴⁸

The basic provisions of the Dawes Act were that (1) each family head would be allotted 160 acres, every single person over 18 and every orphan under 18 would get 80 acres, and every single person under 18 would receive 40 acres; (2) every person was to choose his own allotment, or failing that, an Indian Service official would; (3) the federal government would hold title to the allotments for twenty-five years or longer at the President's discretion; (4) allottees' heirs would inherit according to the laws of the

47. *Hearings Before Comm. on Indian Affairs on H.R. 7902*, 73d Cong., 2d Sess., pt. 9 (1934) at pp. 428 *et seq.*

48. *See* CONG. REC. 783 (Jan. 20, 1881).

state or territory; (5) citizenship would be conferred on allottees who left their tribes and "adopted the habits of civilized life"; (6) surplus tribal land after allotment could be sold to the United States. The Act specifically excluded the Five Civilized Tribes, the Osage, the Miami and Peoria, and the Sac and Fox in Indian Territory.

The jurisdictional status of tribes allotted by the Act was controlled by Section 6, which provided:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they reside

This section as amended by the Burke Act on May 8, 1906, clarified the jurisdictional status of the allottees and the allotted land. The Act was designed "distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to state laws."⁴⁹ This portion of the Act, codified at Section 349 of Title 25 of the United States Code now reads:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided for in § 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; . . . Provided further, that until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; and provided further, that the provisions of this act shall not extend to any Indians in the Indian Territory.

It is clear that the act did not have any effect on the status of the tribes' reservations, nor did it have any effect upon the inherent authority of tribal governments to exercise civil and criminal jurisdiction.⁵⁰ While the original pre-1906 allottees may have been personally subject to state jurisdiction, state jurisdiction did not extend to persons allotted after 1906, unallotted Indians, heirs of any original allottees, or the allotments themselves until the trust period expired for each and every allotment.⁵¹ Thus, the General

49. *United States v. Pelican*, 232 U.S. 442 (1914).

50. *Mattz v. Arnett*, 412 U.S. 481 (1973).

51. *Solicitor's Opinion*, 58 I.D. 455 (1943).

Allotment Act had no effect on either the authority of tribal governments or the area of exercise of that authority. Its only jurisdictional effect, subjecting the original allottees to the personal jurisdiction of the state, is of no consequence at the present time.

During the period from 1890 to 1907, three major events occupied a prominent place in the legal history of Indian tribes in western Oklahoma. This period in history is murky, and the detractors of tribal powers always make vague references to something that happened in this era that eliminated tribal sovereignty and jurisdiction. In fact, tribal sovereignty continued, but the extent of Indian country was limited.

The Oklahoma Organic Act

The Oklahoma Organic Act of 1890⁵² organizing and establishing a temporary government for the Territory of Oklahoma, carefully preserved tribal sovereignty and maintained the status quo for the Indian tribes in western Oklahoma by providing:

That nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribes in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the Government of the United States to make any regulation or to make any law respecting said Indians, their lands, property, or other rights which it would have been competent to make or enact if this act had not been passed.

The following exchange between Congressmen Mansur and Turner during House debates describes the purpose of the Oklahoma Territorial government and its application to the Indian tribes in Oklahoma:

Mr. MANSUR: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?

Mr. TURNER: But I suggest to the gentleman that this is no longer a reservation, but a Territory.

Mr. MANSUR: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*⁵³

52. Act of May 2, 1890, 26 Stat. 81.

53. 51 CONG. REC. 2104 (1890) (remarks of Messrs. Mansur and Turner (emphasis added)).

Further amplifying the notion that the Congress intended the Organic Act to apply to non-Indians only and leave the Indian tribes undisturbed, Congressman Mansur, in pertinent part, stated:

I challenge any gentleman on this floor—I care not who he is—to take any one of the first twenty-four sections of this bill and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation

Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that, as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate. Remember, too, that if any white man sells an Indian a drop of intoxicating liquor he is punished under the severest penalties. The laws in that respect are ample.⁵⁴

The language that ultimately became Section 12 of the 1890 Organic Act was originally included in the first drafts of the bill as Section 8. Section 8 originally drafted limited access to the territorial courts to members of Indian tribes. Congressman Hooker offered an amendment to this language eliminating the word “citizens” and inserting “any person residing in the Territory of Oklahoma in whom there is Indian blood shall have the right to invoke the aid of the courts therein for the protection of his personal property as if he were a citizen of the United States.”

This amendment was later further amended to provide “person or property” rather than personal property, and the proviso preserving tribal jurisdiction added, but the language amending Section 8 gives the clear implication that tribal rights were not to be affected by the Act. This section confers upon a class of people “in whom there is Indian blood” a nonmandatory right to invoke the aid of courts established under the territorial act for their protection. It must be assumed that the federal side of the “district

54. *Id.* at 2176.

courts" convened to hear any cases occasioned by this jurisdictional scheme for the simple reason that construction or application of federal rather than territorial laws would apply.

This Act is the beginning point for the distinction between the Indian tribes in the Oklahoma Territory (western Oklahoma) and the Indian tribes in other parts (Indian Territory) of what ultimately became the state of Oklahoma.

Section 12 of the Organic Act speaks specifically to the jurisdiction of the territorial courts over Indians in western Oklahoma. It provides:

That jurisdiction is hereby conferred upon the district courts in the Territory of Oklahoma over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Territory of Oklahoma, and any citizen or member of one tribe or nation who may commit any offense or crime in said Territory against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the Territory as he would be if both parties were citizens of the United States; and any person residing in the Territory of Oklahoma, in whom there is Indian blood, shall have the right to invoke the aid of courts therein for the protection of his person or property, as though he were a citizen of the United States: *Provided*, That nothing in this act contained shall be so construed as to give jurisdiction to the courts established in said Territory in controversies arising between Indians of the same tribe, while sustaining their tribal relations.

Section 12, taken in the sense most destructive of tribal jurisdiction, gave the territorial courts concurrent jurisdiction over Indians only in intertribal matters, *i.e.*, where both parties were Indians but the controversy involved a tribal member versus a nonmember. This section is susceptible to many different interpretations, but with the most adverse interpretation, none of the Indian tribes were denied jurisdiction over their members.

The opinion of the Department of the Interior contained in a letter to the Attorney General interprets Section 12 in the following manner:

In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible

exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the state courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.⁵⁵

It should be noted that all other statutes relating to Indian jurisdiction utilize the term "Indian country" to designate the territorial limits of tribal and federal jurisdiction. Section 12 makes no reference to Indian country. Notably, if an Indian against Indian offense or transaction occurs outside of Indian country, it is the general rule that the state or territory has jurisdiction if no essential Indian interest is involved and the Congress has not reserved federal jurisdiction over the subject matter. Section 12 is unique in this respect. The legislative history sheds little light on the section. It can be concluded that the internal sovereignty of the tribes was expressed although the unimpaired member jurisdiction was preserved.

Section 12 can be described as a *qualification* of the plenary tribal jurisdiction. However, it is not a significant qualification, as the jurisdiction conferred on the territorial courts is not exclusive jurisdiction. Therefore, if the tribes had exclusive jurisdiction over all Indians within their boundaries prior to this Act, it is clear from a review of the law that intertribal jurisdiction in the Indian tribes is not extinguished but simply shared with the Territory concurrently. That is truly a small usurpation of tribal jurisdiction.

Thus, it can be stated with clarity that the creation of the Territory of Oklahoma had little negative effect on the civil and criminal jurisdictional powers of the Indian tribes in western Oklahoma or on the internal sovereignty as expressed through the power to establish judicial systems.

The Allotment Agreements

The second major event during this era was the subjection of all twelve of the Indian reservations in western Oklahoma to an extensive allotment process. The statutes and agreements providing for the allotment of virtually all tribal land to individual Indians, coupled with cession subject to the allotments of the entire reservation areas to the United States, undoubtedly severely limited the

55. Solicitor's Opinion, Memo. Sol. Dec. 17, 1935.

territorial extent of Indian country in western Oklahoma. Assuming, for analysis purposes, the least favorable interpretation of these allotment agreements and their statutory confirmations, if the reservation boundaries of all twelve reservations in western Oklahoma were thereby disestablished, did these agreements and statutes terminate or extinguish the powers of self-government and internal sovereignty of the tribes? Are these tribal powers coextensive with the reservation boundaries? Is it, *ipso facto*, no reservation boundaries, no tribal powers?

These questions have been authoritatively answered by the Supreme Court of the United States in *DeCoteau v. District County Court*.⁵⁶ By treaty, the Lake Traverse Indian Reservation was established in 1867 for the Sisseton and Wahpeton bands of the Sioux Tribe of Indians. In 1891, Congress, by statute, ratified an 1889 Allotment Agreement between the Sisseton-Wahpeton Sioux Tribe and the United States. The Act⁵⁷ provided that each Indian would be allotted 160 acres pursuant to the General Allotment Act and the remaining unallotted land was ceded to the United States. The Sisseton-Wahpeton Agreement provided that the tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"⁵⁸

The Sisseton-Wahpeton Agreement was included in a comprehensive act which ratified at the same time, among others, the allotment agreements with three Indian tribes in western Oklahoma—the Citizen Band Pottawatomie Agreement, the Absentee Shawnee Agreement, and the Cheyenne and Arapaho Agreement. The Supreme Court described the cession language of these other agreements as "virtually identical to that in the Sisseton-Wahpeton Agreement,"

The Court held that the 1891 Act confirming the language of the Sisseton-Wahpeton Allotment Agreement had the effect of disestablishing the Lake Traverse Indian Reservation and, therefore, the state of South Dakota had jurisdiction over non-Indian unallotted lands within the original reservation boundaries. More precisely stated, the South Dakota courts have jurisdiction over that part of the former reservation that is not Indian country within the meaning of Section 1151 of Title 18. The allotted land within the former reservation boundaries continues under tribal jurisdiction pursuant to the Indian country definition found in Section 1151(c). In other words, the disestablishment of

56. 420 U.S. 425 (1975).

57. Act of Mar. 3, 1891, 26 Stat. 989.

58. *Id.*

the reservation boundaries places non-Indian unallotted lands outside the Section 1151(a) Indian country definition, but tribal jurisdiction continues over the trust allotments as Indian country under Section 1151(c).

The *DeCoteau* decision clearly stands for the proposition that, unless the allotment agreement speaks to the extinguishment of tribal governing powers, the internal sovereignty of an Indian tribe survives the disestablishment of the reservation boundaries. The Supreme Court summarized the jurisdictional status on disestablished Indian reservations in the following manner:

It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 USC § 1151(c).⁵⁹

The congruity between the legal circumstances faced by the majority of Indian tribes in western Oklahoma and the extremes of the legal aftermath occasioned by the disestablishment of the Lake Traverse Indian Reservation makes *DeCoteau* a definite judicial guidepost for those Indian tribes in Oklahoma whose reservations have possibly been disestablished.

The jurisdictional history of the reservation involved in *DeCoteau* almost tracks step by step the jurisdictional history for Indian tribes in western Oklahoma. The same denial and vacillation is evident.

The recounting of the jurisdictional history could, with few revisions, be that of most of the Indian tribes in western Oklahoma. The *DeCoteau* Court states:

The jurisdictional history is not wholly clear, but it appears that state jurisdiction over the ceded [*i.e.*, unallotted] lands went virtually unquestioned until the 1960's. The Lake Traverse Reservation was eliminated from the maps published by the Commissioner of Indian Affairs until 1908; thereafter, some Government maps included the area as "open" or "former" reservation, while more recent ones have

59. *DeCoteau v. District County Ct.*, 420 U.S. 425, 442, 443 (1975).

characterized it simply as a "reservation." Federal Indian agents have remained active in the area, and Congress has regularly appropriated funds for the tribe's welfare; the unallotted Indian tracts have retained their "trust status pursuant to periodic Executive Orders" In 1963, the Court of Appeals for the Eighth Circuit held that the 1891 Act had terminated the reservation; in the process, the court noted that "the highest court of that state [South Dakota] has repeatedly held that South Dakota has jurisdiction," and that the "Justice Department had taken a like position" ⁶⁰

The strength of the decision rests upon the unequivocal vindication of tribal sovereignty in spite of the lack of classical reservation status. The holding in *DeCoteau* was specifically followed in *United States ex rel. Cook v. Parkinson*. ⁶¹

It can be stated with clarity that even in adopting the most unfavorable posture for analysis, the Indian tribes in western Oklahoma are vested with jurisdiction over all Section 1151(b) or (c) Indian country within the original reservation boundaries.

Enabling Act

The Oklahoma Enabling Act ⁶² contained two provisos relating to jurisdiction over the person and property of Indians in western Oklahoma, and as a result of these provisos, the Act had absolutely no effect on the right of Indian tribes in western Oklahoma to exercise civil and criminal jurisdiction in Indian country. Section 1, speaking to the preservation of Indian rights, declared:

Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise which it would have been competent to make if this act had never been passed.

The Oklahoma courts have consistently interpreted this section to preserve federal authority over Indian matters after the admission of the state of Oklahoma to the Union. *Neal v. Travelers In-*

60. *Id.*

61. 396 F. Supp. 473 (1975).

62. Act of June 16, 1906, 34 Stat. 267.

surance Co.,⁶³ and *Ex parte Nowabbi*,⁶⁴ a case considering the above quoted section in the context of federal versus state jurisdiction over a murder occurring on a Choctaw allotment, held that the federal constitutional requirement relating to admission of states into the Union on an equal footing (equal footing doctrine) does not preclude Congress from imposing conditions upon the state of Oklahoma in the enabling act designed to protect tribal Indians and their property.

The section clearly provides that nothing contained in the constitution to be adopted by the state of Oklahoma is to be construed as limiting or impairing the rights of person or property of the Indians residing in either Oklahoma or Indian Territory. Any construction of the Oklahoma constitution must follow this mandate. The right of person or property of a tribal Indian invariably must relate both to rights guaranteed by federal law and to his umbrella of rights flowing through and from his inherent status as a member of a self-governing Indian tribe. The express recognition and preservation of tribal jurisdictional powers in Section 12 of the Organic Act is an example of what this proviso in the enabling act sought to prohibit the Oklahoma constitution from limiting or impairing.

Section 3 of the Act, third paragraph, required the Oklahoma constitution to contain a disclaimer of title and jurisdiction over Indian trust lands. Thus, when Oklahoma entered the Union, its entry was expressly conditioned on the promise that the state would

agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States

The language of the enabling act was adopted by the people of Oklahoma by irrevocable ordinance and continued into Oklahoma's own constitution as Article I, Section 3.

On this disclaimer clause the Supreme Court's decision in *Organized Village of Kake v. Egan*,⁶⁵ has been asserted as applicable to the western Oklahoma jurisdictional situation. In considering tribal, civil, and criminal jurisdiction, the site or *locus in*

63. 188 Okla. 131, 106 P.2d 811 (1940).

64. 60 Okla. Cr. 111, 61 P.2d 811 (1940).

65. 369 U.S. 60 (1962).

quo of the act or transaction must be within Indian country for federal and tribal jurisdiction to attach. An examination of that case reveals that its facts render the holding inapplicable to the western Oklahoma question for two sound reasons.

In *Kake* the Supreme Court held that federal jurisdiction as set forth in the various disclaimer clauses of the enabling acts for at least thirteen states did not invariably mean "exclusive" jurisdiction and, therefore, did not preclude the exercise of residual state authority.⁶⁶ However, that decision was rendered in a fishing rights dispute between the state of Alaska and two Indian communities organized pursuant to the Indian Reorganization Act of 1934⁶⁷ who were exercising their fishing rights outside of Indian country. In fact, neither of these Indian communities had ever had an Indian reservation, constituting a *locus in quo* for the attachment of tribal jurisdiction, established for them. These circumstances vary considerably from those in western Oklahoma where the legal aftermath of the various allotment and cession agreements affecting Indian reservations is the issue.

The import of the enabling act, then, is not in provisions affecting tribal authority or the sphere of exercise of tribal power, as there are none. Rather, the importance of this act as it affects Indian tribes is in the transfer of jurisdiction from the territorial court system to the federal district courts or the state court.

Applying Section 12 of the Organic Act, it is clear that the state courts succeeded to the intertribal jurisdiction of the territorial courts. Governor Murray, in the 1953 letter discussed previously,⁶⁸ was stating the situation, as he understood it to be, without the benefit of reviewing the congressional enactments directly bearing on the jurisdictional question. Having had the benefit of reviewing pertinent federal statutes, it is clear, under the most rigorous jurisdictional test, that each of the Indian tribes in western Oklahoma is vested with civil and criminal jurisdiction over Indian country within their original reservation boundaries as a matter of residual internal sovereignty, which Congress has not expressly qualified other than in Section 12 of the Organic Act, and each of the tribes has the continuing power to establish a tribal court system for the administration of justice.

Stated in another way, the allotment of the various Indian reservations in western Oklahoma coupled with the cessions to the United States of the unallotted lands greatly diminished the

66. *Id.* at 71.

67. Act of June 18, 1934, 48 Stat. 984.

68. See Letter from Oklahoma Governor Johnston Murray to Assistant Secretary of the Interior Orme Lewis (1963), in text at page 25.

geographic area over which tribal, civil, and criminal jurisdiction might be exercised, but the allotment and cession process did not terminate tribal powers of self-government and each of the tribes retained the legislative authority to provide for a tribal judicial system.

Indian Reorganization Act of 1934

The Indian Reorganization Act of 1934, while made inapplicable to the Oklahoma tribes through Section 13, is important due to its later application to the tribes via the Oklahoma Indian Welfare Act. Section 16 of the Act provides: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers"

Thus, the Indian Reorganization Act did not limit the authority of any tribe to exercise civil and criminal control within its jurisdiction. Instead, the Act provided an alternative method, acceptable by the United States, for the organization of tribal governments. Therefore, the provisions of the Act enumerating certain tribal powers was neither a reduction or extension of tribal authority, but was merely a statutory confirmation of those rights.⁶⁹

Oklahoma Indian Welfare Act (1936)

The Oklahoma Indian Welfare Act,⁷⁰ essentially a supplement to the Indian Reorganization Act, was enacted in 1936 to provide for the general welfare of the Indians of the state of Oklahoma. In Section 3 of the Act, Congress provided that: "The Secretary of the Interior may issue to any such organized group a charter of incorporation Such charter may convey to the incorporated group . . . [the right to] . . . enjoy any other rights and privileges secured to an organized Indian tribe under the Act of June, 1934."⁷¹ In addition, all acts or parts of acts inconsistent with this act were expressly repealed. Thus, it would appear that the exclusionary clause of the Indian Reorganization Act excluding Oklahoma tribes from the provisions of the Act was repealed and, therefore, the powers of the Indian tribes in Oklahoma were statutorily confirmed to the same degree as those of any other Indian tribe.

69. COHEN, *supra* note 15, at 126. See also Solicitor's Opinion, 55 I.D. 15 (1934).

70. Act of June 26, 1936, 49 Stat. 1967.

71. Indian Reorganization Act, June 18, 1934, 48 Stat. 984.

Presumably, the tribes of western Oklahoma could include in their constitutions provisions enabling them to exert those powers listed in the Solicitor's Opinion⁷² relating to the powers of Indian tribes as these tribes are previously recognized tribes as evidenced by their entry into treaty relationships with the United States.⁷³ As a result of such powers, each tribe is vested with the authority to establish and maintain a tribal judicial system or judicial branch of tribal government⁷⁴

Public Law 83-280 (Act of August 15, 1953)

The termination policy of the early 1950's resulted in Public Law 280,⁷⁵ which conferred jurisdiction to the states of California, Minnesota, Nebraska, Oregon, and Wisconsin, except for specified reservations, over all criminal acts, civil causes of action, and civil laws of general application, with the exception of certain enumerated civil actions. The Act also provided that any state whose enabling act and constitution contained disclaimers of jurisdiction over Indians was given permission to amend its constitution and assume jurisdiction. However, no such state was allowed to assume jurisdiction unless and until its constitution had been amended.

Governor Murray's letter to Orme Lewis expressed the generally held presumption against Indian tribes exerting jurisdiction in the following language:

When Oklahoma became a State, all tribal governments within its boundaries became merged in the State and the tribal codes under which the tribes were governed prior to statehood were abandoned and all Indian tribes, with respect to criminal offense and civil causes, came under State jurisdiction.

Therefore, Public Law No. 280 will not in any way affect the Indian citizens of this State.⁷⁶

While Governor Murray's presumptions as to the demise of tribal codes, the demise of most governmental functions, and Oklahoma's succession to jurisdiction may be true for that portion

72. Solicitor's Opinion, 55 I.D. 15 (1934).

73. Solicitor's Opinion, M-36783 (1969).

74. Establishment of Tribal Judicial System, Sisseton-Wahpeton Sioux Tribe, Field Solicitor's Opinion, Aberdeen Office, BIA, June 9, 1972 (App. at 21).

75. 18 U.S.C. § 1162 (1970).

76. Murray Letter, *supra* note 68.

of the state which comprised the Indian Territory,⁷⁷ there is no authority for the presumption that those tribal governments in western Oklahoma (the old Oklahoma Territory) ceased to function or that their authority to enact and enforce tribal laws had been impeded in any significant way. Thus, Oklahoma has never acted to amend its constitution or otherwise comply with the requirements of Public Law 280 and has not obtained any jurisdiction thereunder.⁷⁸ It should be noted at this point that Public Law 280 was amended by Title IV of the Civil Rights Act of 1968,⁷⁹ to require the consent of the tribe, by special referendum, before a state may acquire jurisdiction.

Can an Indian tribe unilaterally and voluntarily vest a state with civil and criminal jurisdiction over Indian country? In *Kennerly v. District Court*,⁸⁰ the Court held the *Williams v. Lee*⁸¹ test inapplicable to the situation presented because the *Williams* test was predicated upon determining the power of states to act in the absence of congressional authority to regulate matters affecting Indians, in contrast to the *Kennerly* case wherein "a governing Act of Congress" was in effect at the time of the decision, that is, Public Law 280.

The *Kennerly* decision stands for the proposition that the statutory requirements for assuming civil and criminal jurisdiction over Indian country within a state by that state must be strictly adhered to if state jurisdiction is to be effectuated. In *Kennerly*, the tribal council voted to give the state concurrent jurisdiction resulting in the argument by the state of Montana that the *Williams* test was met in that the state action did not impinge on tribal self-government. The Supreme Court rejected that argument.

On Public Law 280, *Williams* says that Arizona has not voted to accept such responsibility but rather applies the infringement test. *Kennerly* says the infringement test is not proper in the instance where a "governing Act of Congress" is in effect. Therefore, Oklahoma, by not complying with the requirements to assume jurisdiction as mandated by Congress, has not had any jurisdiction conferred upon it by Public Law No. 83-280 and would presently be required to acquire the consent of each individual tribe prior to assuming jurisdiction over that tribe.

77. See Curtis Act of June 28, 1898, 30 Stat. 495; Act of Apr. 26, 1906, 34 Stat. 137.

78. *United States v. Littlechief*, reported in *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978).

79. Pub. L. No. 90-284, § 406, 82 Stat. 78 (1968).

80. 400 U.S. 423 (1971).

81. 358 U.S. 217 (1959).

*Indian Civil Rights Act (April 11, 1968)*⁸²

The idea that the civil liberties guaranteed by the Bill of Rights of the United States Constitution were inapplicable to tribal governments was strikingly confirmed by the case of *Talton v. Mayes*.⁸³ The court stated: "It follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment"⁸⁴ Therefore, while tribal authority was subject to limitations imposed by congressional legislation, it was not bound by the United States Constitution as amended.

In 1968 Congress enacted the Indian Civil Rights Act of 1968, Title II of which defined certain rights guaranteed to Indian individuals. This Act placed a number of limitations on the authority of the tribal governments to enact and enforce tribal legislation. Because this Act imposes the most limitations on the Oklahoma tribes governmental authority, it is included herein in its entirety:

TITLE II-RIGHTS OF INDIANS

Definitions

Sec. 201. For the purposes of this title, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "Powers 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

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Indian Rights

Sec. 202. No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances:

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search

82. Pub. L. No. 90-284, § 406, 82 Stat. 78 (1968).

83. 163 U.S. 376 (1896).

84. *Id.* at 382-84.

and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

It should be noted that while the Indian Civil Rights Act imposes many of the restrictions of the Bill of Rights on the tribal government, some portions of the Bill of Rights were specifically deleted, such as the provisions prohibiting the establishment of religion and the right to appointed council. These deletions leave the tribal government free to act in these areas in whatever manner it determines to be in the best interest of the tribe.

The Supreme Court has recently held that the Indian Civil Rights Act⁸⁵ does not constitute and express or implied congressional authorization for a civil suit against a tribe or its officers.⁸⁶ In holding that tribal immunity from suit in civil matters was not waived by the Act, the Court stated:

Title I of the ICRA does not expressly authorize the bringing of civil action for declaratory or injunctive relief to enforce

85. 25 U.S.C. § 1302 (1970).

86. *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670 (1978).

its substantive provisions. The threshold issue in this case is thus whether the Act may be interpreted to impliedly authorize such actions, against a tribe or its officers, in the federal courts. For the reasons set forth below, we hold that the Act cannot be so read.⁸⁷

The significant limitation placed on the tribal governments by this Act is the limitation of authorized punishments. Thus, should the tribe mandate a fine or imprisonment as punishment for any particular crime, the maximum allowable punishment is a \$500 fine, or imprisonment for a term not to exceed six months, or both. However, as to other punitive measures, the only significant limitation is the limitation against cruel and unusual punishment.

While the Indian Civil Rights Act limits the authority of the tribes and imposes certain of the guarantees of the United States Bill of Rights, the federal courts have not construed the Act to impose upon the tribes the decisional law construing the Bill of Rights as applied to the federal government. For example, it would seem that if a tribe has traditionally used restitution as a method of punishment for adultery, then restitutionary measures in excess of \$500 might be approved as not being a fine and not constituting cruel and unusual punishment. In short, the provisions of the Act are generally construed against the background of tribal tradition and law instead of United States case law,⁸⁸ and, while a significant limitation on tribal authority, speaks more toward the procedural processes a tribe is required to follow than to the tribe's authority to enact substantive law.

The Effect of the Legislative Enactments

Analysis of the pertinent congressional enactments from a posture most detrimental to tribal governmental authority reveals that the Congress has imposed the following limitations and qualifications upon the tribes residing in the old Oklahoma Territory:

I. Limitations of Tribal Authority

A. Substantive Limitations

1. Congress has assumed exclusive jurisdiction over the following offenses;

- (a) murder, 18 U.S.C. § 1153
- (b) manslaughter, 18 U.S.C. § 1153
- (c) rape, as defined by state law, 18 U.S.C. § 1153

⁸⁷. *Id.* at 1671.

⁸⁸. *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *McCurdy v. Steele*, 353 F. Supp. 629 (D.C. Utah 1973).

(d) carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, 18 U.S.C. § 1153

(e) assault with intent to commit rape, as defined by state law, 18 U.S.C. § 1153

(f) incest, as defined by state law, 18 U.S.C. § 1153

(g) assault with intent to kill, 18 U.S.C. § 1153

(h) assault with a dangerous weapon, as defined by state law, 18 U.S.C. § 1153

(i) arson, 18 U.S.C. § 1153

(j) burglary, as defined by state law, 18 U.S.C. § 1153

(k) robbery, 18 U.S.C. § 1153

(l) larceny, 18 U.S.C. § 1153

2. Congress has decreed that no Indian tribe in exercising powers of self-government shall—

(a) make or enforce any law prohibiting the free exercise of religion, 25 U.S.C. § 1302(1)

(b) make or enforce any law abridging the freedom of speech, 25 U.S.C. § 1302(1)

(c) make or enforce any law abridging the freedom of the press, 25 U.S.C. § 1302(1)

(d) make or enforce any law abridging the right of the people peaceably to assemble and to petition for a redress of grievances, 25 U.S.C. § 1302(1)

(e) take any private property for a public use without just compensation, 25 U.S.C. § 1302(5)

(f) deny to any person within its jurisdiction the equal protection of its laws, 25 U.S.C. § 1302(8)

(g) deprive any person of liberty or property without due process of law, 25 U.S.C. § 1302(8)

(h) pass any bill of attainder or ex post facto law, 25 U.S.C. § 1302(9)

B. Procedural Limitations. Congress has decreed that no Indian tribe, in exercising the powers of self-government shall—

1. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized, 25 U.S.C. § 1302(2)

2. subject any person for the same offense to be twice put in jeopardy, 25 U.S.C. § 1302(3)

3. compel any person in any criminal case to be a witness against himself, 25 U.S.C. § 1302(4)

4. require excessive bail, impose excessive fines, inflict cruel and unusual punishment, 25 U.S.C. § 1302(7)

5. in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months, or a fine of \$500, or both, 25 U.S.C. § 1302(7)

6. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons, 25 U.S.C. § 1302(10)

II. Qualifications of Tribal Authority

A. Oklahoma Organic Act § 12 and Oklahoma Enabling Act § 17. The combined force of these provisions conferred on the state courts of the state of Oklahoma concurrent jurisdiction with tribal authorities over those civil and criminal cases not exclusively vested in the federal courts, if, but only if, the cause arose from a controversy involving citizens or members of different, nonaffiliated tribes or nations. This jurisdiction is not exclusive and does not apply at all in controversies involving members of the same or affiliated tribes.

B. Indian Civil Rights Act

1. The Indian Civil Rights Act extends the privilege of the writ of habeas corpus to any person wishing to test the legality of his detention by order of an Indian tribe. The writ will be heard in federal court, 25 U.S.C. § 1303.

2. The United States Supreme Court has held that the Indian Civil Rights Act does not, by implication, create a limited waiver of the sovereign immunity of the tribal government when it is alleged that the tribal government has violated the provisions of the Act.⁸⁹

This ruling as it relates to western Oklahoma is stated by Judge Luther B. Eubanks: "Nevertheless, a United States District Court does, in a proper case, have jurisdiction to entertain a challenge to a tribal election process where the effect of that process has been to deny a tribal member's civil rights."⁹⁰

This analysis indicates that while certain of the fundamental rights of self-government possessed by the western Oklahoma tribes has been limited or qualified by acts of Congress, these tribes are not more limited, in any significant degree, than any federally recognized tribe outside the border of the state of Oklahoma. The only difference in the authority of the western

89. See *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976) (equal protection); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974) (equal protection); *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974) (equal protection); *O'Neil v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973) (tribal immunity); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) (voting rights).

90. *Johnson v. Little Axe*, Chairman of the Absentee-Shawnee Tribe of Indians of Oklahoma, No. CIV 77-0249-E (May 24, 1977).

Oklahoma tribes and non-Oklahoma federally recognized tribes, is that the western Oklahoma tribes exert jurisdiction over crimes or controversies arising between citizens or members of different nonaffiliated tribes or nations *concurrently* with the state instead of *exclusively*.

Subject to the limitations imposed by the Indian Civil Rights Act and the Major Crimes Act, the legally constituted governmental bodies of the tribes of western Oklahoma retain exclusive authority to:

1. determine their form of government,
2. establish tribal courts and to employ tribal police,
3. to adopt a tribal law and order code,
4. to undertake correction functions,
5. to undertake programs aimed at preventing adult and juvenile delinquency,
6. to undertake adult and juvenile rehabilitation programs,
7. to enact and enforce a civil code,
8. provide for adoption and guardianships,
9. to tax and collect taxes,
10. to regulate hunting and fishing,
11. to grant marriages and divorces,
12. to control economic development through zoning regulations and other land use planning devices,
13. to exert the power of eminent domain,
14. to administer justice with respect to all offenses and disputes

JURISDICTION OF CRIMES COMMITTED IN "INDIAN COUNTRY"
WITHIN THE FORMER OKLAHOMA TERRITORY

Offender	Victim	Degree of Crime	Authority Having Jurisdiction
Crimes having a victim:			
Indian	Indian	Major*	Federal
Indian	Indian	Minor	Tribal
Indian	non-Indian	Major	Federal
Indian	non-Indian	Minor	Federal or Tribal
non-Indian	Indian	Major	Federal
non-Indian	Indian	Minor	Federal
non-Indian	non-Indian	Major	State
non-Indian	non-Indian	Minor	State
	Intertribal	Major	Federal
	Intertribal	Minor	Tribe or State
Crimes without a victim*		—	Federal or Tribal

*For purposes of this chart, a major crime having a victim is defined as any of the 13 crimes listed in 18 U.S.C. § 1153 (1970).

of or among members of the tribe, other than those offenses reserved to the federal courts,

15. to exercise all other powers of an Indian tribe as recognized by the Solicitor in 55 I.D. 15 (1934).

Indian Country

The term "Indian country" was first authoritatively defined by the Act of June 30, 1834,⁹¹ which provided:

That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state, to which the Indian title has not been extinguished, for the purposes of this Act, be taken and deemed Indian country,

In the leading case, *Bates v. Clark*,⁹² the Supreme Court had occasion to discuss the Act of June 30, 1834, saying:

What, then, is Indian country, within the meaning of the acts of Congress regulating intercourse with the Indian? . . . The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.⁹³

Although this section was not reenacted when the United States statutes were revised (resulting in its repeal) it has provided a useful basis for defining Indian country during a period in which there was no statutory definition.⁹⁴

In Cohen's *Federal Indian Law*, "Indian country" is defined as:

Although the "Indian country" has been used in many senses, it may perhaps be most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable . . .

91. 4 Stat. 729 (1834).

92. 95 U.S. 204 (1871).

93. *Id.* at 206.

94. *Clairmont v. United States*, 225 U.S. 551 (1912); *United States v. LeBris*, 121 U.S. 278 (1887).

The greater part, however, of the body of federal Indian law and tribal law applies only to certain areas which have a peculiar relation to the Indians and which in their totality comprise the Indian country

The Indian country at any particular time must be viewed with reference to the existing body of federal and tribal law.⁹⁵

In the intervening years between the repeal of the 1834 act and the 1948 statutory codification of the definition as it evolved on a case-by-case basis, a number of important decisions were made regarding the Indian country character of Indian reservations carved out of public domain and individually held allotted lands. These matters are important in that in at least one case involving Indian lands in western Oklahoma it was urged that the "Indian country" definition applied only to lands held in "original" Indian title, meaning those lands which are the aboriginal homelands of a particular tribe. It was further urged that if these lands set aside for Indian use were not held in aboriginal title, no Indian title attached and the Indian title would be deemed extinguished, thereby eliminating the Indian country character of the lands. This notion was laid to rest in *Donnelly v. United States*.⁹⁶ On this matter, the Court states:

Under these decisions, the definition as contained in the act of 1834 may still "be referred to in connection with the provisions of its original context that remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where that was formerly subject to the Indian occupancy, the case cited furnish a criterion for determining what is "Indian country." But "the changes which have taken place in our situation" are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian country", within the meaning of those provisions of the Revised Statute that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.⁹⁷

95. COHEN, *supra* note 15, at 5.

96. 228 U.S. 243 (1913).

97. *Id.* at 269.

The question of whether Indian allotments carved out of the tribal estate and allotted to individuals retained their Indian country character was laid to rest in *United States v. Pelican*,⁹⁸ and later in a case from Oklahoma, *United States v. Ramsey*.⁹⁹ These cases are more fully discussed later in the section on Indian country jurisdiction.

In 1948, Congress enacted a comprehensive statutory definition of Indian country, which is codified at Section 1151 of Title 18 of the United States Code. It provides:

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.

In order to understand the parameters of what is and what is not "Indian country," however, it is necessary to understand that the language of Sections 1151, 1152, and 1153 did not become effective until June of 1948.

Prior to 1948, Section 2145 of the Revised Statutes¹⁰⁰ read: "Except as to crimes the punishment of which is expressly provided for in this title, the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, shall extend to the Indian country."

Section 1152 did not make any important change in the language of the law prior to 1948:

The preceding section [Sec. 2145] shall not be construed to extend to crimes 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.¹⁰¹

98. 232 U.S. 442 (1914).

99. 271 U.S. 467 (1926).

100. 25 U.S.C. § 217 (1875).

101. Rev. Stat. § 2146, 25 U.S.C. § 218 (1875).

And, finally, instead of Section 1153, there stood Section 9 of the Act of March 3, 1885,¹⁰² which constituted a specific exception to Section 2146 of the Revised Statutes.

Sec. 9 (Indians committing certain crimes in Territories, etc., subject to laws thereof—in States and Indian reservations, to what laws subject.) That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or another person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and on and within the limits of any Indian reservation under the jurisdiction of the United States Government, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

The statutes of the United States pertaining to jurisdiction over criminal causes of action, and the case law interpreting those statutes become more lucid, if, and only if, one carefully (a) segregates each of the statutes set out above by the date of their enactment; (b) notes the date at which any cause of action arises; (c) characterizes, as Indian or non-Indian, both the alleged victim and the alleged offender; and (d) understands the legal character of the land upon which the cause arises.

Moreover, it must always be carefully borne in mind that the congressional definition of "Indian country" is trip tite in form; that Congress has chosen to include within that definition (1) reservation lands, "under the jurisdiction of the United States Government, notwithstanding the issuance of any patent"; (2) "dependent Indian communities"; and (3) Indian allotments, the

102. Major Crimes Act, *as amended* 23 Stat. 385 (1885).

"Indian titles to which have not been extinguished."¹⁰³ Failure to ascertain under which part of this tripartite definition one ought properly to assert one's jurisdictional claim is nothing less than an open invitation to definitional disaster.

Although on its face, Section 1151 defines "Indian country" solely for criminal jurisdictional purposes, it is clear from an examination of the judicial treatment of Indian country definitions since the 1948 adoption of Section 1151 that the courts consider the Indian country definition contained therein to apply regardless of whether the subject-matter jurisdiction is civil or criminal.¹⁰⁴

This treatment of Section 1151 by the court has been supported by the Congress because a comparison of post-1948 statutory enactments pertaining to state assumption of criminal and civil jurisdiction over Indians reveals that Congress subscribes to the Section 1151 definition of Indian country for both criminal and civil jurisdiction purposes.¹⁰⁵

The discussion of whether this statutory definition of Indian country categorically includes the land holdings of Indian tribes in western Oklahoma turns specifically on the status of these lands as reservation lands, dependent Indian communities, and allotments.

Definition of Section 1151(a) Jurisdiction

Section 1151 defines "Indian country" as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter [§§ 1151-1165 of this title], 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.¹⁰⁶

103. 18 U.S.C. § 1151 (1970).

104. *See, e.g.,* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 177, 178 n.17 (1973); Kennerly v. District Ct., 400 U.S. 423, 424 n.1 (1971).

105. *Compare, e.g.,* 18 U.S.C. § 1162 (criminal) with 28 U.S.C. § 1360 (civil), both included in the Act of Aug. 15, 1953, 67 Stat. 588, 589. There is an undifferentiated use of the term "Indian country" in these statutes. *See also* H.R. REP. No. 848, 83d Cong., 1st Sess. 6 (1953). While the tribal jurisdiction has extraterritorial reaches similar to the jurisdiction of a state, and § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. *DeCoteau v. District County Ct.*, 420 U.S. 425, 427 n.2 (1975).

106. Act of June 25, 1948, ch. 645, § 1, 62 Stat. 75; Act of May 24, 1949, ch. 139, § 25, 63 Stat. 94.

Thus, as the Supreme Court spelled out in *DeCoteau v. District County Court*¹⁰⁷:

If the lands in question are within a continuing "reservation", jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c)¹⁰⁸

And:

While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. *McClanahan v. Arizona State Tax Comm'n*; *Kennerly v. District Court of Montana*; *Williams v. Lee*.¹⁰⁹ [Citations omitted.]

Of course, this enunciation of the law, as it is today, only has real significance (apart from the thrust of Section 1151(c)) if reservations are found still to exist in the state of Oklahoma.

It is this writer's belief that recent rulings by the Supreme Court in *DeCoteau*, *Seymour*,¹¹⁰ *Rosebud Sioux Tribe v. Knip*,¹¹¹ and *Mattz v. Arnett*,¹¹² justify a complete reassessment of the effect of agreements, consummated in pursuance of the General Allotment Act, upon the reservation status of Indian lands.

Those rulings make it quite clear that: "A Congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."¹¹³

Nor, the Supreme Court asserts, will it lightly conclude that an Indian reservation has been terminated.¹¹⁴ And: "When Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."¹¹⁵

107. 420 U.S. 425 (1975).

108. *Id.* at 472. n.2.

109. *Id.* at 304 n.2.

110. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

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

112. 412 U.S. 481 (1973).

113. *Id.* at 505.

114. *DeCoteau v. District County Ct.*, 420 U.S. 425 (1975).

115. *United States v. Celestine*, 215 U.S. 278, 285 (1909).

Moreover, the congressional intent to so separate them therefrom "must be clear, to overcome 'the general rule that' doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."¹¹⁶

Certainly, the Court will not read such an intent into the General Allotment Act of 1887. According to the Supreme Court:

That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished.* Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law, 115-117, 127-129, 776-777 (1958).¹¹⁷

The General Allotment Act, says the Supreme Court in *DeCoteau*, was simply "an attempt to reconcile the government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands."¹¹⁸ The Act really did no more than empower the President "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit."¹¹⁹ It is, therefore, equally certain "that reservation status may survive the opening of a reservation to settlement, even when the moneys paid for the land by the settlers [is] all placed in trust by the Government for the Indians' benefit."¹²⁰

As continuing reservation status is not inconsistent with the opening of a reservation to settlement, because, in fact, it was part of the grand design behind the General Allotment Act both to maintain reservation status while opening Indian lands to settlement, the existence of patent land, Indian or non-Indian, within a

116. *DeCoteau v. District County Ct.*, 420 U.S. 425 (1975), quoting from *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).

117. *Mattz v. Arnett*, 412 U.S. 481 (1973).

118. *DeCoteau v. District County Ct.*, 420 U.S. 425, 432 (1975).

119. *Id.*

120. *Id.* at 444.

reservation's boundaries will not result in a termination of that status. In fact, says the Court, the presence of non-Indian patented land will not even work an alteration in reservation boundaries:

The State [of Washington] urges that we interpret the words "notwithstanding the issuance of any patent" to mean only notwithstanding the issuance of any patent to an Indian. But the State does not suggest, nor can we find, any adequate justification for such an interpretation. Quite the contrary, it seems to us that the strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.¹²¹

Furthermore, says the Supreme Court in *DeCoteau*, even a cession of lands, so long as it is not a cession of all unallotted lands, will not result in a termination of the reservation:

The Congress included the Sisseton-Wahpeton agreement in a comprehensive Act which also ratified several other agreements providing for the outright cession of surplus reservation lands to the Government. The other agreements employed cession language virtually identical to that in the Sisseton-Wahpeton Agreement, but in these other cases the Indians sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservation.¹²²

Should there be any doubt as to whether these new decisions must occasion a rethinking of case law precedent in the state of

121. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

122. *DeCoteau v. District County Ct.*, 420 U.S. 425, 439-40 (1975).

Oklahoma, it is suggested the Supreme Court's assessment of the purpose behind the treaties incident to the General Allotment Act be compared with the assessment of that purpose made by the Tenth Circuit in *Ellis v. Page*: "The treaty evinces a manifest purpose to dissolve tribal government and assimilate the Indian allottees in the community in which they lived as citizens and owners of land with a grubstake to enable them to compete on an equal footing with their non-Indian neighbors."¹²³

Or, one might reread the opinion of Judge Murrah in *Tooisgah v. United States*,¹²⁴ holding that because of the partial cession by the Kiowa, Comanche, and Apache (the tribes excepted from cession 480,000 acres of grazing lands), "it cannot be doubted that Congress thereby intended to . . . disestablish the organized reservation, and assimilate the Indian tribes as citizens of the state or territory"¹²⁵ and contrast it with what the Supreme Court in *DeCoteau* appears to believe the result of partial cession to be.

Application of Section 1151(a) Jurisdiction to Western Oklahoma

In determining whether the allotment agreements or statutes allotting the western Oklahoma tribes disestablished or diminished their reservations, general principles of statutory construction must be applied.

Only Congress can disestablish, diminish, or alter the boundaries of an Indian reservation. The Court has ruled that when a reservation has once been established, all tracts included within it "remain a part of the reservation until separated therefrom by Congress."¹²⁶

The premise imposes on the state the burden of pointing to any federal action that disestablished the Oklahoma reservations as described in the applicable treaties, or that in some way altered or diminished the boundaries of those reservations. Unless the allotment agreements constitute such federal action, the state does not have jurisdiction.

Courts will not lightly impute to Congress an intent to abridge or abrogate Indian treaty rights or statutory rights. Indian tribes have a special relationship with the United States. Chief Justice John Marshall described tribes as "domestic dependent nations" and characterized their relationship with the United States as that

123. 351 F.2d 250 (10th Cir. 1965).

124. 186 F.2d 93 (10th Cir. 1950).

125. *Id.* at 97, 98.

126. *United States v. Celestine*, 215 U.S. 278, 285 (1909). See also *Mattz v. Arnett*, 412 U.S. 481, 504, 505 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962).

of a ward to its guardian.¹²⁷ *Seminole Nation v. United States*¹²⁸ enunciates the duty imposed on the United States and its courts in dealings with Indian tribes.

Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, the United States has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Flowing from this recognition of the Indian's special status, the Supreme Court has posited "the settled rule that, as between the whites and the Indians, the laws are to be construed most favorably to the latter."¹²⁹

Doubtful provisions of statutes are resolved in the Indian's favor. Although Congress has general plenary power over its Indian wards,¹³⁰ the intention of Congress to abridge or abrogate rights or benefits secured to a tribe by treaty must be very clear.¹³¹

Determination of the effect of the allotment acts must start with these general guiding principles. To these general principles, *Mattz* and *Seymour* add four specific rules for construction of statutes which open for settlement the surplus and unallotted lands within Indian reservations: (1) The language of the statute disestablishing, diminishing, or altering a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history";¹³² (2) statutory failure to lessen federal trust responsibility for Indians having tribal rights on the reservation shall be construed as an intent to maintain the existence of the reservation undiminished; (3) subsequent enactments of Congress recognizing the continued existence of a reservation support the

127. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

128. 316 U.S. 286, 296, 297 (1942).

129. *Red Bird v. United States*, 203 U.S. 76, 94 (1906). See also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 160, 174 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Peoria Tribe v. United States*, 390 U.S. 468, 472-73 (1968); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 354 (1941); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 79 (1918); *United States v. Celestine*, 215 U.S. 278, 290 (1909); *Winters v. United States*, 207 U.S. 564 (1908); *The Kansas Indians*, 72 U.S. 737 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 585 (1832); COHEN, *supra* note 15, at 37.

130. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

131. The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Pigeon River Improvement Co. v. Cox*, 291 U.S. 138, 160 (1934). See also *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

132. *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

construction that the opening for settlement statute did not alter or diminish the reservation; and (4) construction and treatment of the opening for settlement statute by the officials and attorneys of the Department of Interior, the agency of government having primary responsibility for Indian affairs, shall be accorded special weight and consideration.

The task facing any Indian tribe which seeks to prove that its reservation status remains unimpaired or has been only partially impaired is an enormous one. There is no litmus test for whether, or to what extent, reservation status continues.

The Supreme Court, in *Kneip*, emphatically insists that "factors" relied on in previous cases—whether the tribe had agreed to a cession or it had been unilaterally forced upon them by the Congress (*DeCoteau*), whether the lands of the tribe in question were purchased by the federal government for a sum certain (*Seymour*)—are not "absolutes."¹³³

The focus of our inquiry is congressional intent. This Court has pointed in its prior decisions to factors from which intent is inferred. The dissent erroneously seized upon several factors and present them as apparent absolutes. . . . This, however, misapprehends the nature of our inquiry, which is to inquire whether a congressional determination to terminate is "expressed on the face of the Act or is clear from the surrounding circumstances and legislative history"¹³⁴

It is for each tribe, therefore, to weigh the benefits of establishing *de jure* reservation status against the costs which the arduous task of reconstructing tribal history, interpreting a hundred years of tribal relationships with the executive and legislative branches of the federal government, and litigating the issues hereby presented, will necessarily entail.

For instance, the Iowa Indians, in the now familiar language in Article I of their 1891 allotment agreement, "surrender and relinquish" to the United States all their "right, title, claim and interest" to their entire reservation. However, in Article V, the allotment agreement provides:

There shall be excepted from the operation of this agreement a tract of land, not exceeding ten acres in a square form, including the church and schoolhouse and graveyard at or near the Iowa village, and ten acres of land shall belong to said

133. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590 (1977).

134. *Id.* at 588 n.4.

Iowa Tribe of Indians in common so long as they shall use the same for religious, educational, and burial purposes for their said tribe—but whenever they shall cease to use the same for such purposes for their tribe, said tract of land shall belong to the United States.¹³⁵

And, further, in the Supplement Articles, Article XII provides for another ten-acre tract for tribal use. It states:

It is further agreed that when said allotments are being made, *the Chief of the Iowas may select an additional ten acres* in a square form *for the use of said tribe in said reservation*, conforming in boundaries to the legal subdivisions of land *therein, which shall be held by said tribe in common* but when abandoned by said tribe shall become the property of the United States.¹³⁶

Applying the principles extracted from the recent Supreme Court cases, it is apparent that Article V clearly “except[s] from the operation” of the 1891 allotment agreement a ten-acre tract of land constituting under the most severe construction a “diminished” reservation. Article XII of the agreement further carries this notion forward by reserving another ten-acre tract to be selected by the Iowa chief to be held in common by the tribe for tribal use.

On the broader question of whether the allotment agreement unequivocally contemplated extinguishment of the original Iowa reservation boundaries, no express language of extinguishment is found in the body of the agreement, and Articles II, III, and XII contain language that affirmatively suggests a continuation of reservation status.

Article II, for instance, provides that, “Each and every member of said Iowa Tribe of Indians shall be entitled to select and locate upon said Reservation or tract of country eighty acres of land which shall be allotted to such Indian in severalty.” Seemingly, Article II’s language contemplates a reservation after allotment.

Article III, in pertinent part, states that, “when all of said allotments are made and approved, then the residue of said reservation, except as hereinafter stated (Articles V and XII), shall, as far as said Iowa Indians are concerned, become public land of the United States.” The “residue” of the reservation language coupled with the exception out of the operation of the agreement of the reserved tract mentioned in Article V and the other tract of tribal land authorized under the same terms in Article XII certainly

135. Act of Feb. 18, 1891, 26 Stat. 753 (emphasis added).

136. *Id.*

raises a substantial question regarding intent to disestablish the reservation boundaries.

Article XII continues with language indicating that simultaneously with the allotment process, the Iowa chief is authorized to select another ten-acre tract "in said reservation, conforming in boundaries to the legal subdivisions of land therein," for continued tribal use. Moreover, the congressional enactment giving statutory confirmation of the agreement states in Section 7, "That whenever and of the lands acquired by the agreements in this act ratified and confirmed, shall be operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of to actual settlers only, under the provision of the homestead laws."

It is generally accepted that the allotment of land within an Indian reservation does not for that reason alone terminate the reservation boundaries. Nor does opening the reservation to settlement by non-Indians necessarily serve to disestablish the reservation. It can be forcefully argued that the language of the Iowa Allotment Agreement is ambiguous on the disestablishment question and, in fact, in applying the judicial doctrine of the Supreme Court either continuation or diminishment of the reservation boundaries is strongly indicated rather than termination.

It has been stated with certainty that all of the Indian tribes in western Oklahoma are nonreservation tribes. It is clear from in-depth research that such a hasty conclusion may not stand under closer scrutiny with respect to *all* tribes in western Oklahoma. To be sure, three decisions have been rendered holding that cession language in the allotment agreements evidenced on the face of the act the intent of Congress to disestablish the Kickapoo Reservation,¹³⁷ the Kiowa, Comanche and Apache Reservation,¹³⁸ and the Cheyenne and Arapaho Reservation.¹³⁹ The question of whether the Cheyenne and Arapaho boundaries were extinguished is currently before the federal courts.

It is clear from reviewing these cases that the courts deciding *OG&E*, *Tooisgah*, and *Ellis* found disestablishment from the face of the acts and did not go beyond the act and look to the surrounding circumstances and legislative history to determine the intent of Congress. In *Seymour*, *Mattz*, and *DeCoteau*, the Court applied a different standard and required a positive, unambiguous intent to disestablish or terminate the reservation boundaries

137. *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206 (1943)

138. *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950).

139. *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965).

without considering other factors. A more detailed discussion of the *Tooisgah* and *Ellis* cases will follow in the section on Indian country jurisdiction; however, the point to be made about these cases is that apparently the Supreme Court since *Seymour* and following cases would not have found a clear and unambiguous intent to disestablish these reservations from the face of the acts involved without a broader inquiry.

The allotment and opening statutes affecting the existence or nonexistence of reservation boundaries of the Indian tribes in western Oklahoma fall into three separate categories. First, the most extreme situation is presented by the Act of April 21, 1904¹⁴⁰ in which specific reference is made to the reservation boundaries of the Otoe-Missouria and Ponca tribes, wherein the act states, "That the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." This language has been specifically referred to in *Seymour* and *Mattz* as the kind of clear expression of intent required to find disestablishment of the reservation boundaries on the face of the act. Second, the language found in the agreement between the Iowa, Sac and Fox, Kiowa, Comanche and Apache, and Kaw tribes reflects no reference to the reservation boundaries whatsoever, but contain a cession, *i.e.*, "hereby surrender and relinquish to the United States all their right, title, claim and interest of every kind and character." As no reference is made to the reservation boundaries in this last category of agreements and because this language is typical language used to transfer possessory rights while not necessarily involving a change of jurisdiction, it appears an ambiguity does exist.

The point of this discussion quite simply is to point out that without a judicial determination consistent with the Supreme Court's standards for finding disestablishment, to conclude glibly that the reservation boundaries of all Indian tribes in western Oklahoma have been extinguished is an expression of faith in a shaky legal conclusion.

It is also clear that any change in the contemporary notions regarding the reservation status of Indian tribes in western Oklahoma will likely require litigation. However, with respect to these tribes in the second category in which specific tracts were reserved out of the cession, there is a strong possibility that the Department of the Interior might change its position by administrative fiat and find that the reservations were diminished rather than disestablished.

140. 33 Stat. 189.

Definition of Section 1151(b) Jurisdiction

The initial employment of the phrase "dependent Indian community," which was to be incorporated in Section 1151 of Title 18, appears to have occurred in the case of *United States v. Sandoval*.¹⁴¹ According to Mr. Justice Devanter:

Not only does the constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising care and protection over all dependent Indian communities.¹⁴²

The Supreme Court in *Sandoval* does deal with New Mexico's argument that federal power over Indians could not be made to include the lands of the Pueblos, because the Indians held their land in fee simple:

It is true that the Indians of each pueblo do have such a title to all lands connected therewith, excepting such as are occupied under executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States were adjudged subject to the legislature of the Congress.¹⁴³

The key, however, to determining whether the settlement of the Indians in question constitutes a "dependent Indian community," "Indian country" subject to federal jurisdiction, is not the status of the land upon which it is situated, but the manner in which they have been treated by the executive and legislative branches of the federal government. Thus, the Court, in *Sandoval*, concludes that the Pueblos are "dependent Indian communities" because

they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities. These public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction, agents and superintendents have been provided to guard their interests,

141. 231 U.S. 28 (1913).

142. *Id.* at 45.

143. *Id.* at 48.

central training schools and day schools at the pueblos have been established¹⁴⁴

A settlement of Indians is a "dependent Indian community," then, if Congress and the executive branch decide it should be one. The Court makes it clear that, "[I]t is not meant by this that Congress may bring a community or body of people within the range of this [its] power by arbitrarily calling them an Indian tribe."¹⁴⁵ Still, "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by the Congress, and not by the courts."¹⁴⁶

In 1938, the Supreme Court was called upon to decide whether the Reno Colony of Indians, clearly not a "reservation," was "Indian country." Mr. Justice Beach, speaking for the Court, stated:

The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation or a colony."¹⁴⁷

The fact that the federal government retained title to the lands of the Reno Colony, again, clearly is not crucial. What is important is the "relationship which has long existed between the Government and the Indians and which continues to date,"¹⁴⁸ that the land "is under the superintendence of the Government."

It is important to take note, here, of the fact that *United States v. McGowan* explicitly follows *United States v. Sandoval* and that *United States v. McGowan* provided, according to the revised notes in Section 1151, the basis for Section 1151(b).

The contention that Section 1151(b) may be read to include within the term "Indian country" Indian settlements whose dependency on federal support has been recognized by the federal government, regardless of the status of their lands, has received the support of the Tenth Circuit.

144. *Id.* at 39, 40.

145. *Id.* at 46.

146. *Id.*

147. *United States v. McGowan*, 302 U.S. 535, 538 (1938), *rev'g* 89 F.2d 201 (9th Cir. 1937), *aff'g* *United States v. One Chevrolet Sedan*, 16 F. Supp. 453 (D. Nev. 1936).

148. *Id.*

In *United States v. Martine*,¹⁴⁹ the state of New Mexico argued that it has jurisdiction over a Navajo charged with the involuntary manslaughter of another Navajo within what was known as "the checkerboard area," "a patchwork of land, some of which is owned by the Navajo Tribe, some of which is not." It was clear, said the court, that, "The particular place where the accident took place was neither on an Indian reservation nor on an allotment. It was in an area known as the Ramah community on land owned by the Navajo Tribe, it having been purchased with tribal funds from a corporate owner."¹⁵⁰

The court in *Martine* explicitly follows *United States v. Sandoval*, in which decision the Supreme Court "looked to the manner in which the pueblos had been treated by legislative and executive agencies and concluded that the pueblos were dependent Indian communities."¹⁵¹

After reviewing *Sandoval*, says the Court, it is convinced that the proper approach to the problem of what is or is not a "dependent Indian community" was followed by the trial court below:

The trial court received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area. The testimony of enforcement officers and Bureau of Indian Affairs officials support the trial court's holding that the situs of this accident was Indian country.¹⁵²

But, argues the appellant, if "Indian country is to include land that is neither Indian reservation, nor trust, nor allotment and held under federal restriction," does not the holding imply "that wherever a group of Indians is found, e.g., in Los Angeles, there is a dependent Indian community?" The court says it will not go that far: "The test we are applying here is not so simple. Only after considering all of the various factors we have noted, as well as any other relevant factors, can the trial court determine the status of a particular area. The mere presence of a group of Indians in a particular area would undoubtedly not suffice."¹⁵³

Application of Section 1151(b) Jurisdiction to Western Oklahoma

All the Indian tribes in western Oklahoma own land within

149. 442 F.2d 1022 (10th Cir. 1971).

150. *Id.*

151. *Id.* at 1023.

152. *Id.*

153. *Id.*

their original boundaries to which federal and tribal jurisdiction would attach under Section 1151(b). The tribal character of the ownership meets the tests relating to use and occupancy of the property, in addition to satisfying any requirement that the entity or "community" have a history of distinctive Indian treatment and eligibility for federal benefits as distinguished from instances wherein a number of Indians live in proximity.

These tribal lands are ordinarily the center of tribal governmental activity. The tribal headquarters, tribal community buildings, and other facilities are ordinarily located on tribal lands. The balance of tribal land is reserved for and put to tribal economic endeavors.

Finally, the various Indian tribal communities in western Oklahoma constitute dependent Indian communities within the meaning of this statute because of a long-standing, uninterrupted trustee relationship with a defined legal status *vis-a-vis* the United States clearly beyond any occasional relationship such as that mentioned in *United States v. Martine*, distinguishing a true dependent Indian community from "a group of Indians living in Los Angeles." For instance, the Absentee Shawnee community is a distinctly Indian community dependent upon the United States for the continuation of its tribal status, and is presently under the superintendence of the federal government. Therefore, the occupation and use of this tribal community of its tribal lands render these lands Indian country for tribal and federal jurisdictional purposes.

Definition of Section 1151(c) Jurisdiction

In 1948 even Congress realized that the definition of Indian country set forth in Section 1151(a) of Title 18 would not encompass those trust allotments on the public domain in the opened areas of what had theretofore been reservations.¹⁵⁴ As a result, Section 1151(c) was set forth as an addition to the definition of Indian country: "(c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

Logically enough, to support the continuation of these allotments as Indian country, the decision of the Supreme Court which held that allotments on the public domain in the opened areas of what had theretofore been reservations should continue to be subject to federal jurisdiction was cited: "Indian allotments were included in the definition on authority of the case of *United States v. Pelican*." [Citation omitted.]

154. H.R. REP., 80th Cong., 2d Sess., Reviser's Note, 18 U.S.C. § 1151 (1948).

In *Pelican* the Court held that federal jurisdiction was not extinguished merely because the trust allotment had been left behind on the public domain when the boundaries of a reservation were receded after the opening of that reservation. Specifically, the Court in *Pelican* was involved with the 1892 opening of the Colville Reservation which disestablished approximately one-half of the Colville Reservation. To this extent, Section 1151(c) specifically approved and provided for the impractical pattern of checkerboard jurisdiction. Some provision had to be made for the opening that left behind trust allotments situated on the public domain outside the boundaries of a reservation. It appears that this provision was specifically tailored to fit precisely the situation presented by the Sisseton-Wahpeton opening addressed in *DeCoteau*.

Thus, Section 1151(c) does not operate as a restriction on clause (a) but carries a force of its own:

Clause (c) came into the statute as the result of the holding in *United States v. Pelican*, [citation omitted] namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement . . . Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of § 1151. We regard (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seems to be clear.¹⁵⁵

The jurisdictional status of Indian trust and restricted allotments has long been a matter of judicial scrutiny. The cases of *United States v. Pelican*,¹⁵⁶ *United States v. Ramsey*,¹⁵⁷ *DeCoteau v. District County Court*,¹⁵⁸ *Ex parte Van Moore*,¹⁵⁹ *In re Carmen*,¹⁶⁰ and *United States ex rel. Cook v. Parkinson*,¹⁶¹ are all cases considering the character of Indian allotments outside the limits of continuing Indian reservations. These cases uniformly hold that

155. *Beardslee v. United States*, 387 F.2d 280, 287 (8th Cir. 1967).

156. 232 U.S. 442 (1914).

157. 271 U.S. 467 (1926).

158. 420 U.S. 425 (1975).

159. 221 F. 954 (1915).

160. 165 F. Supp. 942, *aff'd* 270 F.2d 809 (1958).

161. 306 F. Supp. 473 (1975).

Indian trust allotments, even though not within the boundaries of an Indian reservation, retain distinctively Indian character during the trust period because they are devoted to Indian occupancy under the limitations imposed by federal legislation. In addition, at least two Oklahoma decisions, *Ex parte Nowabbi*,¹⁶² and *Ex parte Wallace*,¹⁶³ conclude that trust allotments are Indian country within the meaning of the statutes reserving exclusive jurisdiction to the United States.

In *Pelican*, the defendants Sam Pelican and Tony Ponterre were indicted for the murder of Ed Louie, a fullblood Indian and a member of the Colville Tribe. The murder took place upon the allotment of Agnes, a Colville Indian, which was held in trust for her by the United States. The allotment was made pursuant to the General Allotment Act of 1887 within an area ceded to the United States by the Colville Tribe and restored to the public domain. The Court stated:

It cannot be doubted that the power of Congress was quite as complete to punish crimes committed by or against Indians upon allotted lands of this character as to prohibit the introduction of liquor. The present question, then, is not one of power, but whether it can be said that the descriptive term "Indian country", as it is used in 2145 of the Revised Statutes, is inadequate to embrace these allotments or, if it is adequate for that purpose, whether Congress, in providing for the allotments has excluded them from the purview of that statute.

We find no inadequacy in the statutory description. The lands, which, prior to the allotment, undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by federal legislation.¹⁶⁴

In discussing Section 6 of the general Allotment Act of 1887,¹⁶⁵ the *Pelican* Court stated:

It is true that by § 6 of the act of 1887, it was provided that upon the completion of the allotments and the patenting of the land to the allottees under that act, every allottee should "have the benefit of and be subject to the laws, both civil and

162. 60 Okla. Cr. 111, 61 P.2d 1139 (1936).

163. 81 Okla. Cr. 176, 162 P.2d 205 (1945).

164. *United States v. Pelican*, 232 U.S. 442, 448-49 (1914).

165. Now codified at 25 U.S.C. § 349, *as amended* (1970).

criminal, of the state or territory" in which he resided. [Citation omitted.] But, by the act of May 8, 1906, chap. 2348 (34 Stat. at L. 182), Congress amended this section so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to state laws. The first part of the section, as amended, is: "That at the expiration of the trust period, and when the lands have been conveyed to the Indians by patent in fee, as provided in § 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside." And, at the same time, there was added to the section of the explicit proviso: "That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." We deem it to be clear that Congress had the power thus to continue the guardianship of the government. [Citation omitted.] . . . And these provisions leave no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction over the allotted lands described in the indictment.¹⁶⁶

In *United States v. Ramsey*,¹⁶⁷ two white men were charged with the murder of Henry Roan, a fullblood Osage Indian and member of the Osage Tribe, which took place upon a restricted, not a trust, surplus allotment. *Ramsey* is a case that arose in the Western District of Oklahoma, and involves the infamous Osage murders of the 1920's. Significantly, the United States Supreme Court in *Ramsey* held that the authority of the United States to punish crimes committed by or against Indians in Indian country continued unaltered after the admission of Oklahoma as a state. On the issue of the restricted allotment as Indian country, the Court stated:

The sole question of our determination, therefore, is whether the place of the crime is Indian country, within the meaning of § 2145. The place is a tract of land constituting an Indian allotment, carved out of the Osage Indian reservation and conveyed in fee to the allottee named in the indictment, subject to a restriction against alienation for a period of 25 years. That period has not elapsed, nor has the allottee ever received a certificate of competency authorizing her to sell. As

166. *United States v. Pelican*, 232 U.S. 442 (1914).

167. 271 U.S. 467 (1926).

pointed out in *United States v. Bowling* [Citation Omitted], there are two modes by which Indians are prevented from improvidently disposing of their allotments. One is by means of a certificate, called a trust patent, by the terms of which the Government holds the land for a period of years in trust for the allottee with an agreement to convey at the end of the trust period. The other mode is to issue a patent conveying to the allottee the land in fee but prohibiting its alienation for a stated period. Both have the same effect so far as the power of alienation is concerned, but one is commonly called a trust allotment and the other a restricted allotment. The judgment of the court below turns upon this narrow difference.¹⁶⁸

The Court set forth its reasoning as follows:

The essential identity of the two kinds of allotments—so far as the question here under consideration may be affected—was recognized in the *Bowling* case, where it was said (p. 487) that in one class as much as the other “the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.” In practical effect, trust or the restricted period, is the same. Since Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States, the question presented is not one of power but wholly one of statutory construction. Viewed from that premise, it would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term Indian country to one and not to the other.¹⁶⁹

In a widely accepted treatise on federal Indian law, the *Ramsey* case is discussed as follows:

Thereafter in *United States v. Ramsey*, Indian country was held to include a restricted allotment as well . . . Thus, the application of federal criminal law was held to cover lands to

168. *Id.* at 470.

169. *Id.* at 471-72.

which the tribal title has been extinguished and title has been vested in an individual.¹⁷⁰

In the *Ramsey* case, the Court makes the determination that regardless of whether title is vested in the tribe or is vested in the individual Indian, thereby extinguishing tribal title, "Indian title" is not extinguished. This determination is of major importance in determining the meaning of "Indian titles to which have not been extinguished" language of Section 1151(c).

Ex parte Van Moore,¹⁷¹ involving a trust allotment wholly outside the boundaries of an Indian reservation, is in accord with *Pelican* and *Ramsey* and adds to the significant weight of authority favoring the legal notion that all Indian trust and restricted allotments are clearly Indian country within the meaning of Section 1151(c).

*In re Carmen*¹⁷² represents a further well-grounded judicial extension of the definition of Indian allotments as Indian country. The trust allotment in question in this case was not carved out of a former Indian reservation but was made pursuant to the General Allotment Act of 1887 upon the public domain. *Carmen* held that an Indian allotment, title to which is still in trust, is within the definition of "Indian country," regardless of whether allotment was made from lands in the public domain or from land of which Indians have had uninterrupted use and occupancy, and, as such, is within the exclusive jurisdiction of the federal courts. The state, to no avail, contended that only allotments included within the definition of Section 1151(c) were those in which the allotment was made from lands within or formerly within an Indian reservation or from land of which the Indians have had uninterrupted use and occupancy. The court, in discussing the legislative history of Section 1151, observed:

Section 1151 represents the first attempt to statutorily define the term "Indian country" since the Act of June 30, 1834, 4 Stat. 729, which had been repealed in 1874 (Revised Statutes § 5596). Section 1151 resulted from the judicial definitions of the term in the intervening years. House Report No. 304, 80th Congress, page 492 states that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican*. In *Pelican* a murder had been committed on an Indian allotment which had been carved

170. COHEN, *supra* note 15, at 8.

171. *Ex parte Van Moore*, 221 F. 954 (D.S.D. 1915).

172. 165 F. Supp. 942, *aff'd* 270 F.2d 809 (1958).

out of an Indian reservation and then excluded from the boundaries of the reservation. The Supreme Court held that so long as the United States held title to the allotment in trust for the Indian allottee it remained Indian country even though the allotment was no longer within the reservation. Respondent interprets the *Pelican* decision to mean that an allotment to be Indian country must have been made from lands which were previously Indian country. But this is an unduly restricted view of that decision. In *Pelican* the allotment in question had in fact been made from lands that were already Indian country. But, that decision does not imply at all that this was a necessary prerequisite to the allotment being Indian country. Indeed, quite the contrary is true. In *Pelican*, the reservation from which the allotment was made had itself been created out of the public domain rather than from land which had previously been in Indian possession. The Supreme Court noted that in an earlier decision, *Donnelly v. United States*, it had held that a reservation set apart out of the public domain was just as truly Indian country as a reservation created from land which had always been occupied by Indians. The court then went on to say that: "In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control." [Citations omitted.]¹⁷³

The *Carmen* court noted the proper interpretation of the title required to come within the purview of Section 1151(c), stating:

Since all Indian allotments, regardless of their source, are maintained under the same type of governmental supervision, either by holding title in trust for the allottee or by

173. *Id.*

restricting alienation, there is no logical reason for making the application of protective criminal statutes dependent upon the source of the allotment. But, if there were otherwise any doubt about the matter, there is an aspect of the legislative history of Section 1151, overlooked by respondent, which compels the conclusion that the Congress intended to include in this statutory definition of Indian country all Indian allotments, regardless of source, while in trust or inalienable by the allottee. Prior to 1948 when Section 1151 was enacted, Section 241 of Title 25 of the United States Code made it a criminal offense to introduce intoxicating liquor into the Indian country and provided that such term should include "any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States." 52 Stat. 969. In 1948, Section 241 was repealed and the prohibition against introducing intoxicating liquor into the Indian country was incorporated in new Section 1154 of Title 18. But, the provision of the repealed Section 241 that Indian country should include "any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States" was omitted from the new Section 1154. The Reviser's Note specifically states this portion of repealed section 241 "relating to the scope of the term 'Indian country' was omitted as unnecessary in view of the definitions of 'Indian country' in Section 1151" of Title 18. It is thus clear that when Congress provided in Section 1151 that Indian country should include "all Indian allotments, the Indian titles to which have not been extinguished," it considered this description broad enough to encompass all Indian allotments while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States. The allotment which was the situs of petitioner's offense is then Indian country within the meaning of the Ten Major Crimes Act.¹⁷⁴

Clearly, the allotments in western Oklahoma possess a greater legal character and dignity as Indian country than the public domain land in *Carmen* in that these Oklahoma allotments are carved out of the communal tribal estate and have been devoted to exclusive and uninterrupted Indian use and occupancy.

174. *Id.* at 946.

Application of Section 1151(c) Jurisdiction to Western Oklahoma

Section 1151(c) provides that Indian country means "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way through the same." Although the statute is clear, case law arising from criminal cases in Oklahoma regarding Indian country jurisdiction has been in disarray. This need not be so. The cause of this disarray appears to be the confusing set of headnotes attached to the easily misunderstood opinion of Judge Murrah in *Tooisgah v. United States*.¹⁷⁵

Tooisgah v. United States (hereafter referred to as *Tooisgah II*) is an important decision not only by reason of what it stands *for*, but also for what it does *not* stand for as authority in considering the Indian country character of Indian trust allotments in western Oklahoma.

On June 2, 1942, Phillip Tooisgah, an Apache Indian, murdered Lucy Tahdooahrippah, a Comanche Indian, in Caddo County, Oklahoma, on the Indian trust allotment of Ellen Mulkehay, an Apache Indian. The Mulkehay allotment was carved from the Kiowa, Comanche and Apache Indian reservation, and title to the allotment was held in trust for her by the United States. In *Tooisgah I*, he was tried, convicted, and sentenced to life imprisonment; his appeal through the Tenth Circuit was completed in 1943. Federal jurisdiction over the offense was based upon the allegation in the indictment that the homicide occurred in Indian country upon a reservation and a tract of land within the exclusive jurisdiction of the United States, and under the applicable federal law in existence in 1942 (Rev. Stat. § 2145, 25 U.S.C. § 217, and 18 U.S.C. § 548) defining Indian country and the applicability of the Ten Major Crimes Act.

Tooisgah, seven years after his conviction and sentence, moved to vacate his judgment and sentence for reason that the federal court was without jurisdiction to impose such sentence.

In this second case, the appellant, Tooisgah, set forth his argument, stating:

Appellant urges a decisive distinction between allotted lands excepted or reserved from a reservation restored to the public domain as in the Pelican case, or a restricted allotment in the Osage Reservation as in the Ramsey case, and an allotment from lands, the Indian title to which had been extinguished before or subject to allotment It is argued with reason,

175. 186 F.2d 93 (10th Cir. 1950) [hereinafter referred to as *Tooisgah II*].

that with the extinguishment of Indian title to all of the lands in the reservation, it no longer retained its Indian character, and therefore ceased to be Indian country within the meaning of Section 2145 (Section 217), and certainly not a reservation within the purview of Section 548.¹⁷⁶

In other words, *Tooisgah* urged the court to find not only that the trust allotments in question were not Indian country as then defined but also that the Indian character of these allotments had been totally extinguished. Although *Tooisgah II* has been cited as authority for such a strained and artificial interpretation, this question was not decided in the case. On this issue, the *Tooisgah* court, speaking through Judge Murrah, stated:

We find it unnecessary to decide whether the trust allotments in question might have been construed as "Indian country" under 217 or 548 when the offense was committed, since we are convinced that Congress did not intend to use the terms "Indian country" and "within the limits of any . . . reservation" synonymously when it came to relax the limitations imposed upon 217 or 218. When the legislative scheme is considered in its historical setting, we think it of controlling significance that instead of employing the familiar term "Indian country", with its broad and flexible definition to delineate federal jurisdiction, Congress chose language carefully designed to recognize the sovereign jurisdiction of a state, unless the offense was committed on a place set apart for the government of the Indians as a tribe. The deliberate choice of the phrase "within any Indian reservation under the jurisdiction of the United States Government" indicates, we think, a Congressional disposition to restrict federal jurisdiction to organized reservations lying within a state.

In the reenactment of 548 as Section 1153, Title 18 USCA, Congress substituted "Indian country" for "on (or) within any Indian reservation", thus conferring federal jurisdiction over the enumerated crimes when committed in Indian country, as defined in Section 1151 of the Revised Criminal Code.

But, judging federal jurisdiction here under the words of the statute when the offense was committed, we are now constrained to hold that when the reservation was dissolved and tribal government broken up, the allotted lands lost their character as lands "within any Indian reservation". Nor did

176. *Id.* at 98.

*they retain or acquire a character and identity peculiar to a separate Indian reservation. We therefore hold that the court lacked jurisdiction over the offense.*¹⁷⁷

The issue of whether trust allotments are or are not Indian country was not decided in *Tooisgah II*. *Tooisgah II*, in essence, is a disestablishment case holding that the Agreement of October 21, 1892, approved June 6, 1900,¹⁷⁸ and commonly referred to as the Jerome Agreement, disestablished the Kiowa, Comanche and Apache Indian reservation, and therefore the Mulkehay allotment, not being within the boundaries of an Indian reservation, was not lands "within any Indian reservation." And, it held, quite simply, that an Indian allotment, the Mulkehay allotment, was not an Indian reservation.

Tooisgah II is not a case of general applicability. It is limited to its facts by its unique application of an already superseded standard. In fact, *Tooisgah II* represented the law of the past on the day the decision was rendered in 1950. Judge Murrah did not apply current law to the second *Tooisgah* case. He applied the law of 1942 in 1950 "judging federal jurisdiction here under the words of the statute when the offense was committed." The statutory law of 1942 had been dramatically changed in 1948 when the Congress enacted a statutory definition of Indian country specifically including all Indian allotments in the definition of Indian country.

Employing the analytical method previously suggested, we find (1) that the cause of action arose on June 2, 1942; (2) that both the alleged victim and the alleged offender are Indians; (3) that the statutes in effect at the time the cause of action arose are Rev. Stat. § 2145 (25 U.S.C. § 217), Rev. Stat. § 2146 (25 U.S.C. § 218), and 23 Stat. 385 (all set out verbatim, *supra*); (4) that the land upon which the cause of action arose was an Indian allotment, legal title to which was still held in trust by the United States.

With these findings in mind, Judge Murrah's reasoning is easy to follow:

First, because both the alleged victim and the alleged offender are Indian, Rev. Stat. § 2145 (25 U.S.C. § 217), as limited by Rev. Stat. § 2146 (25 U.S.C. § 218), do not provide a basis for federal jurisdiction:

Under R.S. § 2145 (25 U.S.C.A. § 217), the general laws of the United States as to the punishment of crimes committed any place within the sole and exclusive jurisdiction of the

177. *Id.* at 99 (emphasis added).

178. 31 Stat. 676, 681.

United States was extended to "Indian country". But the following Section 2146, (25 U.S.C.A. § 218), expressly provides in material part that *Section 2145 should not extend to crimes by one Indian against the person or property of another Indian.*

Murrah concludes quite properly, therefore, that "the only question for decision is whether the asserted federal jurisdiction over the offense is sustainable under § 328 [the Major Crimes Act] as an offense of murder of one Indian by another on and within any Indian reservation under the Jurisdiction of the United States Government."¹⁷⁹

Second, Judge Murrah decides that, by agreement with the United States government, the Kiowa, Comanche and Apache reservation was disestablished. If this is the case, writes Murrah: "The inquiry then is whether these several allotments, into which the reservation was divided, nevertheless remained 'within any reservation: or in some manner became separate reservations for purposes of federal jurisdiction under Section 328'."¹⁸⁰ He concludes that they did not:

[W]e are convinced that Congress did not intend to use the terms "indian country" and "within the limits of any . . . reservation" synonymously when it came to relax the limitations imposed upon 217 or 218. When the legislative scheme is considered in its historical setting, we think it of controlling significance that instead of employing the familiar term "indian country", with its broad and flexible definition to delineate federal jurisdiction, Congress chose language carefully designed to recognize the sovereign jurisdiction of a state, unless the offense was committed on a place set apart for the government of the Indians as a tribe. *The deliberate choice of the phrase "within any Indian reservation under the jurisdiction of the United States Government" indicates, we think, a Congressional disposition to restrict federal jurisdiction to organize reservations lying within a state.*¹⁸¹

And third, if they are no longer lands "within any Indian reservation," Murrah holds, logically enough, "that the court lacked jurisdiction over the offense."¹⁸²

179. *Id.* at 96.

180. *Id.* at 98.

181. *Id.* at 99.

182. *Id.*

It must be noted that the phrase "on and within any Indian reservation under the jurisdiction of the United States Government," referred to by Murrah, was taken from 23 Stat. 385, and *not from* the statutory successor 18 U.S.C. § 1153, and that the phrase Murrah construed has been entirely deleted from Section 1153 and the phrase "*within Indian country*" substituted therefor.

There can be no doubt that under present federal law, as Murrah himself points out, the decision in *Tooisgah* would be precisely the reverse:

In the reenactment of 548 as Section 1153, Title 18 USCA, Congress substituted "Indian country" for on (or) within any Indian reservation, thus conferring federal jurisdiction over the enumerated crimes when in Indian country, as defined in Section 1151 of the Revised Criminal Code.

But, *judging federal jurisdiction here under the words of the statute when the offense was committed* we are now constrained to hold that where the reservation was dissolved... the allotted lands lost their character as Indian reservations.¹⁸³

Murrah understood the definition of "Indian country." He knew that the Supreme Court, in *United States v. Pelican*, had determined that the term included "all Indian allotments, the Indian titles to which have not been extinguished." He was aware of the fact that the result in *Pelican* had been codified in Section 1151(c) of Title 18: "Trust allotments reserved or excepted from a portion of an Indian reservation restored to the public domain was held to retain its character as Indian country"¹⁸⁴

Murrah had merely construed the statute in effect at the time the offense before him had been committed, and the touchstone of federal jurisdiction established by that statute was not "Indian country" but "Indian reservation." How very unfortunate, then, that such a well reasoned and lucid exposition should be confused by the headnotes attached to it:

(1) The term "Indian country" was used in the statute defining that term and the term "within the limits of any reservation" are not synonymous. 18 USCA § 1151. (2) The deliberate choice of the phrase "within any Indian reservation under the jurisdiction of the United States Government" by Congress in defining the term "Indian country" indicated

183. *Id.* (emphasis added).

184. *Id.* at 98.

a congressional disposition to restrict federal jurisdiction to organized reservations lying within a state. *18 USCA § 1151* (emphasis added). (3) Where lands where full-blooded Indian allegedly murdered full-blooded Indian had originally been part of an Indian reservation, but Indians had ceded the lands to the United States subject to allotment in severalty to individual members of tribes, the lands lost their character as lands within meaning of statute defining Indian country, and therefore federal District Court had no jurisdiction of murder prosecution. *18 USCA § 1151*.¹⁸⁵

It might seem needlessly repetitious to point out (1) that the phrase "within the limits of any reservation" to which Murrah referred appeared not in 18 U.S.C. § 1151, but in 23 Stat. 385, a statute no longer in effect, and that the wording in Section 1153 had been made to include the larger concept of "Indian country"; (2) that whether a "congressional disposition to restrict federal jurisdiction over major crimes fo organized.reservations lying within a state" is indicated by the wording of 23 Stat. 385, such a disposition is no longer even arguably in evidence given the new language in Section 1153; (3) that while a determination that Indian lands "lost their character as lands 'within an Indian reservation'" might have meant that under 23 Stat. 385, a federal district court would have no jurisdiction over a prosecution of one Indian for the murder of another, it can no longer have such import under the revised wording of Sections 1151 and 1153.

Again, it might seem needlessly repetitious to point out that despite the import of the headnotes, Judge Murrah construed not the meaning of Sections 1151 and 1153, but of Revised Statutes Sections 2145 and 2146 and 23 Stat. 385. It might, were it not for the progeny the headnotes in *Tooisgah II* appear to have sired.

Tooisgah II, therefore, is not authority in a Section 1151(c) case. Nor are other decisions that tie their validity to *Tooisgah II*, such as *Application of Yates*¹⁸⁶ and *Ellis v. State*,¹⁸⁷ authority in the present inquiry because *Tooisgah II* considered law no longer in force.

In *Application of Yates*, the petitioner, Eugene Yates, sought his release from the Oklahoma State Penitentiary in a habeas corpus action in which he asserted that the crime he was convicted of was committed in "Indian country" against a person of Indian blood

185. *Id.* at 94.

186. 349 P.2d 45 (Okla. Cr. 1960).

187. 386 P.2d 326 (Okla. Cr. 1963).

and under the provision of Article I, Section 3 of the Oklahoma constitution and Sections 1151, 1152, and 1153 of Title 18, the state of Oklahoma was without authority to try and convict him of said crime. The petitioner relied upon *In re Carmen*,¹⁸⁸ a case involving jurisdiction over a trust allotment and clearly construing Section 1151(c). The court cited *Tooisgah II* as contrary to the *Carmen* decision and extensively quoted from the text of the *Tooisgah* opinion. However, the merits were not reached in *Application of Yates*, and the holding appears to be a narrow procedural finding that the petition was insufficient to bring the petitioner within the ambit of the judicial and statutory authority he sought to rely upon. The court stated: "It is not necessary that we reconcile these opinions, since the allegations of the petition are not sufficient to bring the petitioner within the purview of these statutes and adjudicated cases"¹⁸⁹

Indicating its adherence to *Tooisgah*, the court continued:

It is well to observe, however, that even if he is a fullblood Indian as defined by the statute, which he does not allege, under the authority of *Tooisgah v. United States*, supra, he would not be entitled to relief herein by habeas corpus. This necessarily follows since we feel we are bound by the authority of the Court of Appeals of the Tenth Circuit.¹⁹⁰

Aside from the inappropriate reliance upon *Tooisgah*, the petitioner, to his detriment, prepared and filed his petition for habeas corpus without the services of an attorney. A decision in which the moving party is *pro se*, and the state's interests are represented by an attorney, at best, is questionable authority. Judge Brett, writing for the court in *Yates*, finds *Tooisgah II* to have involved "similar facts" and to be "to the contrary" of *Carmen*.¹⁹¹ As evidence of the "contrary" holding in *Tooisgah*, Judge Brett actually quotes not from the text of Murrah's decision, but from the attached headnotes. The court continues and thereby cites, as somehow relevant, conflicts between the language of two statutes which no longer exist. The reason it eluded the court appears obvious. The citations contained in the misleading headnotes appear to relate the decision to an existing statute, Section 1151 of Title 18 of the United States Code. It seems clear that the Court of Criminal Appeals of Oklahoma stood ready to compound the er-

188. 165 F. Supp. 942, *aff'd* 270 F.2d 809 (1958).

189. *Application of Yates*, 349 P.2d 45, 47 (Okla. Cr. 1960).

190. *Id.*

191. *Id.*

ror it had made in *Application of Yates* when it decided the case of *Ellis v. State*.¹⁹²

In *Ellis v. State*, a procedural problem was also present in that Ellis had not raised the jurisdictional question at the trial level. Furthermore, the petition for a writ of habeas corpus in *Ellis* alleged that the offense "occurred on a county road, known as the Old Mill Road, approximately a mile south of the city limits of Clinton, in Custer County, and is within limits of the Cheyenne and Arapaho Indian Reservation." That "Indian reservation as used in the several acts of Congress means 'Indian Country' as defined in 18 USCA Sec. 1151." Ellis' petition is drawn with imprecision and does not designate whether he relies on part (a), (b), or (c). However, the petition is drawn principally to meet the definitional language of Section 1151(a), which provides: "(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" There was no allegation in the petition covering the dependent community language in Section 1151(b), and, more importantly, in terms of the present inquiry, Ellis' petition contained no allegation that the *locus in quo* of the offense was an Indian allotment as defined in Section 1151(c).

To further amplify on the absence of the Section 1151(c) question from the *Ellis* case, Ellis relied on *Seymour v. Schneckloth*,¹⁹³ which is the case turning on the question of whether the Colville Indian Reservation itself was disestablished or dissolved. The offense, burglary, occurred upon property held under a patent in fee located in the town of Omak, Washington. The property of the Colville Tribe was part of the surplus lands opened to settlement under the homestead laws and was not then and had never been an Indian allotment. The lower courts held that although the land upon which the offense occurred had once been within the limits of an Indian reservation, that reservation had since been dissolved and the land in question restored to the public domain. The United States Supreme Court reversed, holding that the land on which the offense was committed had not lost its status as an Indian reservation, and for that reason, it was immaterial that the particular parcel of land in question was held under a patent in fee by a non-Indian and was located in a town. Moreover, the habeas corpus petition in *Seymour* did not allege that the situs of the offense was on a trust allotment nor did it designate a particular clause of Sec-

192. 386 P.2d 326 (Okla. Cr. 1963).

193. 368 U.S. 351 (1962).

tion 1151, as *Ellis* did not. Therefore, the question of jurisdiction over a trust allotment as Indian country within the meaning of Section 1151(c) was not before the court and the holding in *Ellis* is clearly limited to construing Section 1151(a), the Indian reservation section of the statute.

Here, although the court was clearly aware of the existence of Section 1151(c), and even emphasizes the statutory reference to allotted land in the course of its opinion, it once again selects from *Tooisgah* Murrah's reasoning on the subject of why allotted lands were not lands "within any Indian reservation" and, therefore, not within federal jurisdiction under 23 Stat. 385.

The opinion, fortunately, is saved by the fact that the court never actually finds that the crime for which *Ellis* was convicted occurred on an Indian allotment. The court finds, instead, that:

The decisive issue is, what was the character of the lands at the time of the commission of the crime. Was it such as to confine jurisdiction on the United States? If not, then this petition for writ of habeas corpus must fail. The land involved herein prior to March 3, 1891, was an Indian reservation owned and occupied by the Cheyenne and Arapaho Indians. On the aforesaid date the Congress of the United States approved an agreement entered into by and between the Cheyenne-Arapaho Indians and the Government of the United States in October 1890. Therein the Cheyennes ceded all their lands, without any reservation whatever, either express or implied, and all their claims, title and interest of every kind and character to the Government of the United States, subject to allotment, including the lands herein involved. When Congress ratified the aforementioned agreement of secession, it thereby dissolved the Cheyenne-Arapaho reservation as such. Under the said treaty the Indians in said area were made subject to the laws both civil and criminal, of the territory, and later of the State of Oklahoma with the gift of citizenship and equal protection of the laws. [Citations omitted.] Thus the Government of the United States disestablished the Cheyenne-Arapaho Reservation and assimilated the said Indians as citizens of the State of Oklahoma.¹⁹⁴

The court continued, citing *Tooisgah II* as a case directly in point and dispositive of the issue involved therein, even though no

194. *Ellis v. State*, 386 P.2d 326 (Okla. Cr. 1963).

trust allotment question was pressed in *Ellis*. The court further cited *Application of Yates*, and indicated its extensive reliance on *Tooisgah*. The merits of this inquiry, a construction of Section 1151(c) as it related to the Indian country character of trust allotments, were not addressed in either *Yates* or *Ellis* by other than oblique dicta. Those cases are not authority for the jurisdictional issue addressed herein.

Furthermore, the contention that the *Ellis* case decided by the Oklahoma Court of Criminal Appeals is not authority for the jurisdictional issue raised herein is conclusively supported by *Ellis v. Page*,¹⁹⁵ wherein the same defendant filed a petition for a writ of habeas corpus in the federal court, seeking his release from custody on the same conviction complained of in the Oklahoma case. The federal petition contained the same allegations as the state petition and merely constituted a continuation of earlier habeas corpus efforts by Ellis. He again relied on *Seymour v. Superintendent* and *Tooisgah v. United States*. The court, in defining the question presented in Ellis' appeal, announced:

The question is sharply drawn and simply put by the State as whether at the time of the alleged offense the Cheyenne and Arapaho reservation had been disestablished and was non-existent. If not, exclusive jurisdiction was in the United States, the State court lacked jurisdiction, and the writ should issue¹⁹⁶

The court further stated:

There is no contention here that the offense was committed on an Indian allotment "the Indian titles to which have not been extinguished" within the meaning of § 1151(c).

We adhere to *Tooisgah* and hold that the situs of the offense was not within the limits of an Indian reservation within the exclusive jurisdiction of the United States.¹⁹⁷

The emphatic indication by Chief Judge Murrah that no Section 1151(c) question was presented by the *Ellis* appeal creates a strong inference that a different result would have been reached if a trust-allotment-as-Indian-country question had been before the court. Chief Judge Murrah, hearing the same case on appeal from the federal district court where habeas corpus had been denied, cleverly makes certain the point is made that, "There is no contention

195. 351 F.2d 250 (10th Cir. 1965).

196. *Id.* at 251.

197. *Id.* at 252.

here that the offense was committed on an Indian allotment the Indian titles to which have not been extinguished within the meaning of § 1151(c)."¹⁹⁸ For without such a contention having been explicitly dealt with by the Court of Criminal Appeals, one can pass over the troubling emphasis supplied by the court to the words of Section 1151(c), and the approving reference to *Application of Yates*, apparently an Indian allotment case, and properly treat *Ellis v. State* as a case construing not clause (c) but clause (a) of Section 1151. It is interesting to note that while the dangerous *Tooisgah* headnotes are appended to the opinion in *Ellis v. State*, they are not attached to the studiously circumspect opinion of Chief Judge Murrah in *Ellis v. Page*. Unfortunately, Murrah's clever decision appears to have fallen on deaf ears. That the confusion generated by the *Tooisgah* headnotes, in the Oklahoma judiciary, continued beyond *Ellis v. State*, is clear from the case of *Williams v. State*.¹⁹⁹

Once again, a decision of the Court of Criminal Appeals is badly saved from clear error. For, according to the court, the petitioner simply alleged that the land upon which the crime for which he was convicted was "Indian Land,"²⁰⁰ and not that it was an Indian allotment the Indian title to which had not been extinguished.

Still, the court does quote with approval from *Ellis v. State*, quoting, in turn, from *Ex parte Wallace*²⁰¹:

Where Indian pleads guilty to information charging rape in the first degree and no jurisdictional question is raised until after more than three years have elapsed so as to bar prosecution in either state or federal court, the jurisdiction of the state court cannot be challenged in collateral proceeding in habeas corpus on ground that *land on which offense was committed was restricted Indian allotment* and that the person assaulted was a restricted Indian.²⁰²

One cannot but be troubled by the fact that this quotation is followed in the decision by an assertion that, "The *Ellis* case, *supra*, amply covers all points regarding Indian land."²⁰³ For, what was selected from the syllabus prepared by the court in *Ellis* as indicative of this ample coverage is a slightly altered version of the old headnotes from *Tooisgah*: "Deliberate choice of phrase within

198. *Id.*

199. 393 P.2d 887 (1964).

200. *Id.* at 888.

201. 162 P.2d 205 (1945).

202. *Williams v. State*, 393 P.2d 887, 889 (1964) (emphasis added).

203. *Id.*

any Indian reservation under the jurisdiction of the United States Government by Congress in determining the term "Indian country" indicated a congressional disposition to restrict federal jurisdiction to organized reservations lying within a state."²⁰⁴ This disposition being so clear: "The lands and Indians herein involved not being within an Indian reservation . . . are therefore not within the jurisdiction of the federal court but are within the jurisdiction of the State of Oklahoma."²⁰⁵

In sum, until the decision in *State v. Littlechief*,²⁰⁶ there had been no indication from the Court of Criminal Appeals that it recognized the effect of the statutory change that took place in 1948. We cannot yet be certain that it understands that while the deliberate choice of the phrase, "within any Indian reservation under the jurisdiction of the United States Government" in 23 Stat. 385, as opposed to the term "Indian country" employed in Revised Statutes Sections 2145 and 2146 might well have "indicated a congressional disposition to restrict federal jurisdiction to organized reservations," the inclusion of the same phrase in Section 1151 of Title 18, as one part of the tripartite definition of "Indian country" contained therein, most certainly does not.

We cannot yet be sure that the Court of Criminal Appeals is entirely cognizant of the fact that in Section 1151 Congress also chose to extend its jurisdiction over "Indian country," beyond Indian reservations, to include as well all Indian allotments, "the Indian titles to which have not been extinguished," and to "all dependent Indian communities . . . whether within or without the limits of a state." We cannot even know that Section 1153 refers no longer to crimes committed "within any Indian reservation" but instead, to crimes committed within "Indian country." The law is clear. As the United States District Court for the Northern District of California wrote in *In re Carmen*, a habeas corpus proceeding successfully challenging a state attempt to exercise criminal jurisdiction over an Indian who assaulted another Indian on Indian allotted land:

The Ten Major Crimes Act as originally enacted on March 3, 1885, 23 Stat. 385, was not applicable to the Indian country generally but only to Indian reservations. But, when the Act was incorporated into the New Criminal Code in 1948, the reach of the Act was extended to all Indian country as defined in Section 1151 of the code. Section 1151 represented

204. *Id.*

205. *Id.*

206. 573 P.2d 263 (Okla. Cr. 1978).

the first attempt to statutorily define the term "Indian country" since the Act of June 30, 1834, 4 Stat. 729, which had been repealed in 1874 (Revised Statutes § 5596). Section 1151 resulted from the judicial definitions of the term in the intervening years. House Report No. 304, 80th Congress, page 492 states that Indian allotments were included in the definition of Indian Country on the authority of *United States v. Pelican*. In *Pelican* a murder had been committed on an Indian allotment which had been carved out of an Indian reservation and then excluded from the boundaries of the reservation. The Supreme Court held that so long as the United States held title to the allotment in trust for the Indian allottee it remained Indian country even though the allotment was no longer within the reservation.²⁰⁷ [Citation omitted.]

The progeny of *Tooisgah—Application of Yates* and *Ellis v. State*—are not the only Oklahoma cases that have addressed the question of federal versus state jurisdiction over tribal Indians in Oklahoma. For instance, not all Indian allotments were made pursuant to the General Allotment Act of 1887, an important legal distinction underscored in the following case. The issue of criminal jurisdiction over Indian allotments was ruled on by the Court of Criminal Appeals of Oklahoma in 1936 in *Ex parte Nowabbi*.²⁰⁸ At issue in *Nowabbi* was proper situs of criminal jurisdiction over the offense of murder committed by one Indian against another upon a restricted allotment in that part of Oklahoma that had formerly been Indian Territory. In an extensive opinion, the court held, *inter alia*, that decisions of the United States Supreme Court regarding jurisdiction to try an Indian for the murder of another Indian on a restricted allotment are conclusive on state courts; that land which was formerly a part of an Indian reservation established by the United States in a part of Oklahoma that was formerly Oklahoma Territory, which is in possession of Indians under restricted allotment without power of alienation, is "Indian country" within the statute extending general federal criminal laws to Indian country; and that Congress has not reserved to the federal courts exclusive jurisdiction to punish Indians in the Indian Territory for the crimes enumerated in Act of March 3, 1885, even when committed upon a restricted Indian allotment.

The *Nowabbi* court drew the distinction between Indian allotments made pursuant to the General Allotment Act of 1887,

207. *In re Carmen*, 165 F. Supp. 942, 945, *aff'd* 270 F.2d 809 (1958).

208. 60 Okla. Cr. 111, 61 P.2d 1139 (1936).

with its proviso reserving exclusive jurisdiction in the federal courts until issuance of a patent in fee, and other special allotment acts relating principally to the Five Civilized Tribes.

In discussing Section 349 of Title 25 of the United States Code, and its provisos relating to the present jurisdictional question, the court, speaking through Judge Doyle, stated:

It may be said that under this provision of said act all Indian allottees and their allotments in that part of the State of Oklahoma that was formerly Oklahoma Territory, are lands in the Indian Country within the meaning of the section 2145, Rev. Stat., and subject to the exclusive jurisdiction of the United States, until the issuance of fee-simple patents. And the jurisdiction of the courts of the United States over the crimes named in Act of March 3, 1885, to wit, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny when committed on Indian Reservations within the boundaries of a state on trust or restricted allotments therein, by whomsoever committed, without distinction as to race or color, is we think no longer open to discussion. It has passed beyond the state of controversy.²⁰⁹

The trust allotments here considered are Indian allotments in that part of Oklahoma that was formerly Oklahoma Territory. For reasons set forth elsewhere regarding the *Tooisgah* decision, *Ex parte Nowabbi* represents the law both before and after the aberration presented in *Tooisgah*. The codification of the rule enunciated in *United States v. Pelican*, *United States v. Ramsey*, and *Ex parte Van Moore* in Section 1151(c) strengthens the reasoning set forth in *Nowabbi*. *DeCoteau v. District County Court*,²¹⁰ like *Tooisgah*, is a disestablishment case construing the Sisseton-Wahpeton Sioux Lake Traverse Reservation in South Dakota under strikingly similar circumstances to the cession agreement and allotment process that took place in Oklahoma with respect to the Kiowa, Comanche and Apache Reservation.

In *DeCoteau*, the United States Supreme Court held that the 1891 Allotment Agreement containing a cession of all the tribe's unallotted lands and opening the reservation to settlement terminated the Lake Traverse Reservation. However, the Supreme Court held that the land parcels within the former Lake Traverse Reservation which are Indian allotments, the Indian titles to which have not been extinguished, remain Indian country within the

209. *Id.* at 1154.

210. 420 U.S. 425 (1975).

meaning of Section 1151(c) of Title 18, subject to the exclusive jurisdiction of the United States and the tribe over matters not covered by federal law. This fact situation so closely parallels the historical situation with respect to the allotment agreement and cession of tribal lands in western Oklahoma under the General Allotment Act of 1887 and the agreements negotiated with the tribes that *DeCoteau* must be recognized as conclusive authority for the proposition that all trust and restricted allotments within the boundaries of the former Territory of Oklahoma are Indian country within the meaning of Section 1151(c). The Court stated:

The 1867 boundaries of the Lake Traverse Reservation enclose approximately 918,000 acres of land. Within the 1867 boundaries, there reside about 3,000 tribal members and 30,000 non-Indians. About 15% of the land is in the form of "Indian trust allotments"; these are individual land tracts retained by members of the Sisseton-Wahpeton Tribe when the rest of the reservation lands were sold to the United States in 1891. The trust allotments are scattered in a random pattern throughout the 1867 reservation area. The remainder of the reservation land was purchased from the United States by non-Indian settlers after 1891, and is presently inhabited by non-Indians. It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities. In the two cases before us, however, the State asserted jurisdiction over Indians unallotted land within the 1867 Reservation borders.²¹¹

The Court stated further that:

It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments.

With the benefit of hindsight, it may be argued that the tribe and the government would have been better advised to

211. *Ex parte Van Moore*, 221 F. 954 (D.S.D. 1915).

have carved out a diminished reservation, instead of or in addition to the retained allotments, But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the entire reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.²¹²

In *United States ex rel. Cook v. Parkinson*,²¹³ the question of the situs of criminal jurisdiction over the trust allotments within Bennett County, South Dakota, and the disestablished and ceded portion of the Pine Ridge Sioux Reservation was held to be within exclusive federal and tribal jurisdiction in accordance with the Indian country definition of Section 1151(c). The court, specifically following *DeCoteau*, stated:

In the judgment of this court, the only exclusive federal and tribal jurisdiction remaining in Bennett County is over the allotments retained within this ceded area under 18 USC § 1151(c). Because the effect of the act construed in *DeCoteau* was to extinguish tribal jurisdiction over all former reservation lands except for retained allotments, the *DeCoteau* Court felt that the tribe "would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments." Id. In the Act of 1910 under consideration here the Oglala Sioux Tribe did just that. The tribe retained a diminished reservation in the sense that the term is used by the *DeCoteau* Court. 18 USC § 1151(a) applies only to the remaining decreased reservation area because the 1889 boundaries of the Pine Ridge Reservation were changed to exclude the land described in the Act of May 27, 1910, 36 Stat. 440, the moment the presidential proclamation was signed.

In the judgment of this Court, the agreement entered into between the tribe and the government and embodied in the Act of 1910, terminated exclusive tribal and federal jurisdiction over the unallotted lands within Bennett County and

212. *Id.* at 315.

213. 396 F. Supp. 473 (1975).

restored these lands to the public domain and to the jurisdiction of South Dakota. It is also the judgment of this Court that under 18 USC § 1151(a), tribal and federal jurisdiction remains over the land within the diminished reservation boundaries which consist of the area within the 1889 boundaries minus all of the land allotted and unallotted within Bennett County.²¹⁴

In view of the above, there can be no dispute that Section 1151(c) Indian country exists in western Oklahoma.

INDIAN COUNTRY IN WESTERN OKLAHOMA *

Tribe	Acres 1151(b)	Acres 1151(c)
Iowa of Oklahoma	12	1,509
Kansas or Kaw	20	0
Absentee Shawnee	70	13,444.47
Kiowa, Comanche, Apache	5,341	240,509
Caddo, Delaware, Wichita	2,309	67,048
Cheyenne, Arapaho Citizen Band	9,873	97,000
of Potawatomi	261.25	4,270.7
Fort Sill Apache	0	3,613
Kickapoo	17.5	6,128
Otoe-Missouria	1,400	26,156
Pawnee	680.57	26,695.39
Tonkawa	160.5	320.74
Ponca	934.81	16,219
Sac and Fox	805	18,406
TOTAL ALL TRIBES	21,884.63	519,319.3

*The omission of any reference to § 1151 (a) land is not a determination that such Indian country does not exist. Rather, no opinion can be expressed until the Cheyenne-Arapaho case. No. CIV-75-0769, (W.D. Okla.), now on appeal, is decided. Therefore, all references to § 1151 (a) land have been omitted from this chart.

Recent Developments

The Cheyenne-Arapaho challenge to the right of the state of Oklahoma to regulate hunting and fishing by tribal members within the original 1869 reservation boundaries pending in the federal courts, the recent findings by the Division of Indian Affairs in the Department of Interior Solicitor's Office that the Absentee Shawnee and Cheyenne-Arapaho tribes have the power to enact and enforce tribal laws within Indian country, and the federal and state *Littlechief* decisions concerning jurisdiction over trust

214. *Id.* at 494-95.

allotments in western Oklahoma, represent substantial changes in posture—not law—concerning tribal jurisdiction in western Oklahoma.

The Cheyenne-Arapaho case represents affirmative and responsible tribal initiative to resolve the reservation boundary issues. The decision by the Solicitor's Office represents a shift in policy rather than law—the law has been the same since 1890. And, the *Littlechief* decision represents an emerging judicial posture where interpretation of law is paramount, rather than where blind adherence to misplaced slogans about "Oklahoma Indians" prevails. The following is a concise review of these events.

First, in *Cheyenne-Arapaho Tribes v. State*,²¹⁵ the Cheyenne-Arapaho tribes are seeking a declaratory judgment that tribes have the exclusive right to regulate hunting and fishing within the original reservation boundaries and its members have the right to hunt and fish within the original boundaries of the 1869 Executive Order making the Cheyenne-Arapaho Reservation free from state law. The tribes further seek a permanent injunction enjoining the state of Oklahoma from enforcing its fish and game laws against tribal members within the original boundaries of the reservation. This case is the first case brought by one of the tribes in western Oklahoma whose reservation has been judicially interpreted as disestablished under pre-1962 standards. Judicial guideposts for resolving the boundary issues in western Oklahoma will be established in the *Cheyenne-Arapaho* case. The fundamental issue in this case is one of determining where the tribal powers may be exercised. The District Court for the Western District of Oklahoma has ruled adversely to the Cheyenne-Arapaho claim, and the case is now on appeal to the Tenth Circuit Court of Appeals.

Second, recent findings by the Indian Division of the Solicitor's Office involve the efforts of the Absentee Shawnee Tribe and the Cheyenne-Arapaho tribes to be certified as eligible for funding from the Department of Justice, Law Enforcement Assistance Administration (LEAA). LEAA requires, as a condition precedent to funding, certification from the Department of the Interior that an applicant tribe has presently exercizable tribal law and order powers.

Because the question of whether the boundaries of Indian reservations in western Oklahoma have been disestablished by the various allotment agreements is complex and will, in most cases,

215. No. CIV-75-0769-D (W.D. Okla. 1978), *on app.*

require litigation to finally settle the issue, the Absentee Shawnee Tribe, for the purposes of administrative determination for eligibility for LEAA funds, focused on the tribal jurisdictional issue rather than on the existence of reservation boundaries.

The question of whether fundamental tribal powers of self-government survive the allotment process and the extinguishment of reservation status has been authoritatively answered by the United States Supreme Court in *DeCoteau v. District County Court*,²¹⁶ holding that although the Sisseton-Wahpeton Reservation in South Dakota was disestablished and the boundaries extinguished, the civil and criminal jurisdictional powers of the Sisseton-Wahpeton Sioux Tribe expressly remained intact over trust allotments within the original reservation boundaries under Section 1151(c).

Accordingly, the tribe advanced the position to the Solicitor's Office that the tribal powers of self-government, including law and order powers, exist independent of the existence or nonexistence of reservation boundaries. The tribe reasoned that the reservation boundary question goes only to the territorial limits of tribal jurisdiction and not to the existence or nonexistence of the tribal law and order powers.

The *DeCoteau* decision regarding tribal jurisdictional powers over individually owned trust allotments within the original boundaries of a disestablished Indian reservation has been followed in *Rosebud Sioux Tribe v. Kniep*,²¹⁷ and also in *United States ex rel. Cook v. Parkinson*,²¹⁸ a case holding that trust allotments outside the present boundaries of the Pine Ridge Sioux Reservation, but within the original boundaries of the Pine Ridge Sioux Reservation are subject to the jurisdictional powers of the Pine Ridge Sioux Tribe.

In response to the tribe's request, the Acting Associate Solicitor, Division of Indian Affairs, Department of the Interior²¹⁹ stated that the Solicitor's Office had reviewed the acts of Congress relating to the Absentee Shawnee Tribe to determine, first, whether tribal powers had been specifically terminated and, second, the territory within which such powers might be exercised.

After finding that no act of Congress expressly terminated or diminished the tribal governmental powers of the Absentee Shawnee Tribe, the second question was answered in the following manner:

216. 420 U.S. 425 (1975).

217. 430 U.S. 584 (1977).

218. 396 F. Supp. 473 (1975).

219. Opinion Letter of Nov. 16, 1977, to F. Browning Pipestem, Tribal Attorney.

The second question, as you are aware, has been addressed (although not directly in the context with which we are here concerned), in *Tooisgah v. United States*. [Citation omitted.] That decision has been considered an obstacle to exercise of tribal authority since it held that an allotment *under the statutory definition of Indian country then existing* was not a reservation. That decision, however, should be extended no further than it applies—to a statutory scheme which has since been changed. Moreover, the United States Supreme Court in *DeCoteau v. District County Court*, [citation omitted] has defined the jurisdictional status of the circumstances involving the Absentee Shawnee Tribe—those allotments which remain are Indian Country for tribal jurisdictional purposes.

And, the overall findings were summarized as follows:

On the basis of rationale above briefly described, we have concluded that the Absentee Shawnee Tribe possesses power to enact and enforce its laws on restricted lands still held for members of the tribe. Accordingly, we shall advise the Assistant Secretary that no legal impediment exists to exercise of law enforcement jurisdiction by the Absentee Shawnee and also that we recommend that he so certify the Tribe for LEAA purposes.²²⁰

The Cheyenne-Arapaho request was also answered affirmatively by the Division of Indian Affairs. On the Indian country aspect, the opinion stated:

The definition of Indian country includes “all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” Indian allotments in the former Oklahoma Territory, whether trust allotments or restricted allotments, are included within this definition. [Citation omitted.] Allotments held by members of the Cheyenne-Arapaho Tribes of Oklahoma are Indian country over which the tribes and the United States have jurisdiction.²²¹

On the LEAA certification, the Solicitor’s Office recommended:

We recommend, therefore, that the Cheyenne-Arapaho Tribes be certified as exercising law enforcement functions for purposes of LEAA eligibility.

220. *Id.*

221. *Id.*

Denial of BIA law enforcement or judicial services funding to the Cheyenne-Arapaho Tribes of Oklahoma may not be based on the alleged absence of federal or tribal jurisdiction over trust or restricted allotments.²²²

Third, the *Littlechief* decisions, *United States v. Littlechief*,²²³ and *State v. Littlechief*,²²⁴ holding that an Indian trust allotment carved out of the Kiowa, Comanche and Apache Reservation is Indian country within the meaning of Section 1151(c), put *Tooisgah* and its judicial progeny in their proper perspective on the jurisdiction over trust allotments question by specifically declaring any reliance on *Ellis v. State*,²²⁵ to be misplaced. The federal decision, which is incorporated by reference in the state decision, quotes from *DeCoteau*, announcing: "It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities."²²⁶ The court further found that Oklahoma had not amended its constitution to remove impediments to exercising jurisdiction over Indian country and, further, that Oklahoma had not acted pursuant to the "governing acts of Congress"—Public Law 83-280 and the 1968 amendment thereto found in the Indian Civil Rights Act of 1968—to assume jurisdiction over Indian country in Oklahoma. On this subject, the court, speaking through the Honorable Fred Daugherty, stated:

Under the provisions of Public Law 83-280 it appears therefore that the State of Oklahoma could have unilaterally assumed jurisdiction over any "Indian country" within its borders at any time between 1953 and 1968 had the Oklahoma Constitution been amended as required. After the enactment of Title IV in 1968 Oklahoma had to amend its constitution and the affected tribes had to consent to the State's assumption of jurisdiction over them before the State could acquire jurisdiction over "Indian country". See *McClanahan v. Arizona State Tax Commission*; *Kennerly v. District Court*. [Citations omitted.] However, the State of Oklahoma apparently has never acted pursuant to Public Law 83-280 or Title IV and assumed jurisdiction over the "Indian country" within its borders. See *Confederated Bands and*

222. *Id.*

223. CR-76-207-D (W.D. Okla. 1977).

224. 573 P.2d 263 (W.D. Okla. 1978).

225. 386 P.2d 326 (Okla. Cr. 1963).

226. *DeCoteau v. District County Ct.*, 420 U.S. 425, 428 (1975).

Tribes of the Yakima Indian Nation v. Washington. [Citation omitted.]²²⁷

In the decision by the Oklahoma Court of Criminal Appeals, the court affirmed the decision of the Caddo County Court finding that the state of Oklahoma was without jurisdiction to prosecute an Indian for a crime committed upon another Indian in Indian country.

By the *Littlechief* decisions, the judicial posture of the federal and state courts in Oklahoma moved from the aberrant adherence to what *Tooisgah* did not decide, to a consistency with the overwhelming weight of authority.

Summary of Conclusions

The United States has consistently recognized the internal sovereignty of the Indian tribes in western Oklahoma and has expressly limited that sovereignty only through the provisions of Section 1153 of Title 18 and Sections 1302 and 1303 of Title 25 of the United States Code.

The imposition of state law on an Indian tribe is a serious qualification of its internal sovereignty and can be accomplished only by express statutory grant. In the absence of such grant, assumption by the state of jurisdiction over the Indian country without tribal consent violates Section 1326 of Title 25 of the United States Code.

The only express statutory grant allowing the state of Oklahoma to exercise jurisdiction over Indians within the Indian country in western Oklahoma is contained in the Organic Act which extends state jurisdiction concurrently with that of the tribes over intertribal crimes and civil causes of action.

Except for the possible qualification of tribal power found in the Oklahoma Organic Act, the tribes of western Oklahoma retain all powers of tribal self-government possessed by any other federally recognized tribe.

Specifically, each tribe in western Oklahoma retains the inherent authority to determine their formal government, adopt law and order codes, civil codes, undertake correctional functions, undertake programs aimed at preventing adult and juvenile delinquency, undertake adult and juvenile rehabilitation programs, establish tribal court systems, employ tribal police, and to promote the general welfare, health, and safety of the tribe.

The reservation boundary issues, *i.e.*, Section 1151(a) jurisdic-

227. 573 P.2d 263 (W.D. Okla. 1978) (Daugherty, J.).

tion, are presently before the courts and will be clarified in the *Cheyenne-Arapaho* case. Each tribe occupies a unique position with respect to asserting its Section 1151(a) jurisdictional status.

Each tribe retains jurisdiction over some Section 1151(b) Indian country.

Each tribe retains jurisdiction over some Section 1151(c) Indian country.