

# American Indian Law Review

---

Volume 6 | Number 1

---

1-1-1978

## Criminal Jurisdiction Over Indian Schools: Chilocco Indian School, An Example of Jurisdictional Confusion

Noma D. Gurich

R. Steven Haught

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indian and Aboriginal Law Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

Noma D. Gurich & R. S. Haught, *Criminal Jurisdiction Over Indian Schools: Chilocco Indian School, An Example of Jurisdictional Confusion*, 6 AM. INDIAN L. REV. 217 (1978),  
<https://digitalcommons.law.ou.edu/air/vol6/iss1/7>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [darinfox@ou.edu](mailto:darinfox@ou.edu).

# CRIMINAL JURISDICTION OVER INDIAN SCHOOLS: CHILOCCO INDIAN SCHOOL, AN EXAMPLE OF JURISDICTIONAL CONFUSION

*Noma D. Gurich*  
and  
*R. Steven Haught*

Criminal jurisdiction over Indian land has been described as "a complex and confusing maze of federal, state, and tribal jurisdiction."<sup>1</sup> This jurisdictional confusion can pose serious problems with regard to law enforcement in Indian schools. Jurisdictional uncertainty can lead to multiple prosecution problems or a legal vacuum, with no governmental unit taking responsibility for law enforcement.

Chilocco Indian School is under the control of the United States Department of the Interior, Bureau of Indian Affairs, and located on approximately 5,800 acres in Chilocco, Oklahoma.<sup>2</sup> Historically, there has been confusion as to which unit of government had jurisdiction for law and order purposes at Chilocco Indian School.<sup>3</sup> In 1967, the Field Solicitor for the United States Department of the Interior, Anadarko, Oklahoma Region, reported to the Regional Solicitor, Tulsa, Oklahoma Region, that Chilocco Indian School officials encountered difficulties in obtaining local law enforcement assistance, and that the problem had been in existence since the 1950's.<sup>4</sup> However, in the last decade the District Attorney for Kay County, Oklahoma, has exercised criminal jurisdiction over the school.<sup>5</sup> Even with this current exercise of authority, there is continued controversy over whether the federal or state authorities possess criminal jurisdiction.<sup>6</sup> The purpose of this note is to explore the issue of criminal jurisdiction over Indian schools in general by examining the legal arguments as they relate to Chilocco Indian School specifically, realizing that the history of the school is unique in many respects.

1. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 575 (1976) [hereinafter cited as Clinton].

2. Letter from Jimmy Baker, Superintendent of Chilocco Indian School, to Noma Gurich (Jan. 25, 1978).

3. Memorandum Letter from Leon Wall, Superintendent of Chilocco Indian School, to Area Director of Education, Anadarko Area Office (Nov. 30, 1966).

4. Memorandum Letter from Lyle Griffis, Field Solicitor, Anadarko, Okla., U.S. Dep't of the Interior, to Regional Solicitor, Tulsa, Oklahoma region, U.S. Dep't of the Interior (Feb. 27, 1967).

5. *State v. Grass*, FRJ-78-4 (Kay County District Court, June 8, 1978); *State v. Wauhansee*, No. CRM-76-108 (Kay County District Court, 1976).

6. *Id.*

## *Historical Background*

As is so often the case in any area of the law, the current state of the law with respect to criminal jurisdiction over Indian lands is a product of a historical conglomeration of many separate, and often contradictory, statutes.<sup>7</sup> Hence, a brief summary of some of the major legislative acts in this field will place the current state of the law in proper perspective.

In 1834,<sup>8</sup> Congress extended federal jurisdiction to matters involving Indians with non-Indians in Indian country<sup>9</sup> and exempted all Indians from federal jurisdiction for all crimes committed against other Indians within Indian country. Such matters were handled by the tribal courts on Indian reservations.<sup>10</sup> The Federal Major Crimes Act of 1885 reextended federal jurisdiction over matters involving Indians and other Indians for certain enumerated major crimes committed on Indian reservations.<sup>11</sup> Under this Act, the lesser offenses were still within the exclusive jurisdiction of the tribal governments. In 1887, Congress granted to the states jurisdiction over allotted Indian lands, even though the restrictions on alienation were not extinguished.<sup>12</sup> The General Allotment Act of 1887<sup>13</sup> was amended by Congress in 1906<sup>14</sup> to defer the assumption of state jurisdiction over allotted Indian land until the patent in fee on the land had actually issued, except for

7. For an excellent discussion of the historical development of statutory law and case law relative to Indian criminal jurisdiction, see Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975).

8. Act of June 30, 1834, ch. 161, 4 Stat. 729 (1834) (current version at 18 U.S.C. § 1152 (1970)).

9. There was no comprehensive definition of "Indian country" until 1948, when Congress established a definition for matters of criminal jurisdiction. Act of June 25, 1948, ch. 645, § 1151 (1970), which provides that: "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."

10. Act of June 30, 1834, ch. 161, 4 Stat. 729 (1834) (current version at 18 U.S.C. § 1152 (1970)).

11. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153 (1970)).

12. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1970)).

13. *Id.*

14. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (1906) (current version at 25 U.S.C. § 349 (1970)).

such lands in the Indian Territory.<sup>15</sup> On June 25, 1948,<sup>16</sup> Congress reasserted its jurisdiction over all matters within Indian country<sup>17</sup> except where both parties were Indians or the sole-party Indian had already been punished by local tribal law.<sup>18</sup> In addition, Congress reasserted its jurisdiction with respect to certain enumerated major crimes occurring within Indian country, even when committed by an Indian against another Indian.<sup>19</sup>

This brief historical background illustrates that the policies regarding jurisdiction over Indian lands have often fluctuated, leading to the current confused state of the law in this area. This confusion is complicated by the fact that three governmental entities can claim authority over Indian lands: state government, federal government, and tribal government.<sup>20</sup> In an attempt to clarify the jurisdictional situation at Chilocco Indian School, this note will consider three questions: (1) Does the school fall within the jurisdiction of the state of Oklahoma or within the jurisdiction of the federal government; (2) What are the ramifications of concurrent state and federal jurisdiction; and (3) Are there workable solutions to the problems of law enforcement at the school?

### *Indian Country*

It is clear that a state cannot exercise jurisdiction over any land which is defined as Indian country in Section 1151 of Title 18, United States Code. Therefore, Oklahoma does not have criminal jurisdiction over Chilocco Indian School if it is "Indian country,"<sup>21</sup> or if the crime committed is a crime under the Federal Major

15. *Id.* at 34 Stat. 183 (current version at 25 U.S.C. § 349 (1970)).

16. Act of June 25, 1948, ch. 645, 62 Stat. 757 (current version at 18 U.S.C. §§ 1151-1160 (1970)).

17. *Id.* at 62 Stat. 757 (current version at 18 U.S.C. § 1151 (1970)).

18. *Id.* at 62 Stat. 757 (current version at 18 U.S.C. § 1152 (1970)).

19. *Id.* at 62 Stat. 758 (current version at 18 U.S.C. § 1153 (Supp. 1976)).

20. Clinton, *supra* note 1, at 504.

21. 18 U.S.C. § 1152 (1970) provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Crimes Act.<sup>22</sup> However, if Chilocco Indian School is not "Indian country" within the meaning of Section 1151 of Title 18, United States Code, then there is a possible basis in law for the state of Oklahoma to exercise criminal jurisdiction, concurrently with the federal government, over the Chilocco Indian School.

The statutory definition of "Indian country" includes Indian reservations,<sup>23</sup> "dependent Indian communities,"<sup>24</sup> and "all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same."<sup>25</sup> There is no evidence that Chilocco Indian School is an Indian allotment within the above definition of Indian country.<sup>26</sup> A "dependent Indian community" is a distinct Indian community located on communally owned lands held in fee simple, rather than located on an Indian reservation.<sup>27</sup> Clearly, Chilocco Indian School is not included within this definition. The mere presence of a group of Indians in a particular area is not enough to establish a dependent Indian community.<sup>28</sup> Therefore, Chilocco Indian School must be an Indian reservation in order to be properly classified as Indian country.<sup>29</sup>

The determination of whether lands are considered Indian country does not turn on the label used in designating them, nor on the manner in which the lands in question were acquired.<sup>30</sup> Rather, the test is whether such lands have been set apart for the use, occupancy, and protection of dependent Indian peoples,<sup>31</sup> and such deter-

22. 18 U.S.C. § 1153 (Supp. 1976), which provides, in pertinent part, that: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, with the exclusive jurisdiction of the United States. . . ."

23. 18 U.S.C. § 1151(a) (1970).

24. 18 U.S.C. § 1151(b) (1970).

25. 18 U.S.C. § 1151(c) (1970).

26. The term "allotment" refers to "a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972).

27. *See United States v. Sandoval*, 231 U.S. 28 (1913). *See also United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971). Section 1151(b) is a codification of *Sandoval*. Clifton, *supra* note 1, at 508.

28. *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *State v. Cutnose*, 532 P.2d 896 (N.M. 1974).

29. 18 U.S.C. § 1151 (a) (1970).

30. *See United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *Youngbear v. Brewer*, 415 F. Supp. 807 (N.D. Iowa, 1976).

31. *United States v. McGowan*, 302 U.S. 535 (1938); *Youngbear v. Brewer*, 415 F. Supp. 807 (N.D. Iowa 1976).

mination is a question of fact.<sup>32</sup> A brief consideration of the events which led to the establishment of the Chilocco Indian School will be useful in determining the purpose for which the school was created.

Chilocco Indian School, also known as Chilocco Indian School Reserve, is located in an area formerly held by the Cherokee Nation, known as the Cherokee Outlet.<sup>33</sup> On December 29, 1835, the United States government ceded certain lands located in Indian Territory to the Cherokee Nation, on which the Cherokees were to be settled following their removal from areas in the southeastern United States.<sup>34</sup> Most of the land was located in what is now eastern Oklahoma, but the Cherokees were also given a "strip" of land across Indian Territory, known as the "outlet to the west."<sup>35</sup>

On July 19, 1866, the Cherokee Nation negotiated a new treaty in which the United States was granted the right to "settle friendly Indians in any part of the Cherokee Country west of 96°."<sup>36</sup> The United States government took advantage of this clause and settled several tribes within that area, including the Pawnees in 1876<sup>37</sup> and the Poncas in 1878.<sup>38</sup> In 1882, the United States Congress authorized the establishment of an industrial school to be located "at a point in Indian Territory adjacent to the southern boundary of the State of Kansas and near to the Ponca and Pawnee Reservations."<sup>39</sup> In 1884, Chilocco Industrial School Reserve was established by executive order of President Chester A. Arthur.<sup>40</sup> By prior agreement with the Cherokees in 1866,<sup>41</sup> the land for the school was purchased by the United States government.<sup>42</sup> In 1893, the United States government purchased the remainder of the lands in the Cherokee Outlet and opened the area to public settlement, with Chilocco exempted from such settlement.<sup>43</sup>

32. *State v. Cutnose*, 532 P.2d 896 (N.M. 1974).

33. *Treaty of New Echota*, 7 Stat. 478 (1835).

34. *Id.*

35. *Id.*

36. *Treaty with the Cherokee Indians*, 14 Stat. 799 (1866).

37. Act of Apr. 10, 1876, ch. 51, 19 Stat. 28.

38. Act of May 27, 1878, ch. 142, 20 Stat. 63, 76.

39. Act of May 17, 1882, ch. 163, 22 Stat. 68, 85. See 1 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 198 (1904). See also Act of Mar. 1, 1883, ch. 61, 22 Stat. 433, 448.

40. U.S. Dep't of the Interior, Executive Orders Relating To Indian Reservations 141 (1975) (Executive Order of July 12, 1884, President Chester A. Arthur).

41. *Treaty with the Cherokee Indians*, 14 Stat. 799 (1866).

42. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612.

43. *Id.*

Given this historical background, it is useful to examine the actual language used in establishing Chilocco Indian School. The Executive Order of July 12, 1884, by President Chester A. Arthur, which established the Chilocco Industrial School Reserve, stated, in pertinent part, that:

It is hereby ordered that the following-described tracts of country in the Indian Territory . . . are hereby, reserved and set apart for the settlement of such friendly Indians belonging within the Indian Territory as have been or who may hereafter be educated at the Chilocco Indian Industrial School in said Territory.<sup>44</sup>

The words of grant used in establishing Chilocco Indian School are not determinative of the issue of whether the area is Indian country. The United States Supreme Court recognized that the word "reservation" has many different meanings when it held that the mere reservation of public land from sale for any purpose does not make the land Indian country.<sup>45</sup> The language "reserved and set apart" is common to the creation of other Indian schools in Oklahoma.<sup>46</sup> Moreover, the language "for the settlement of friendly Indians" is consistent with the language used in the Treaty of 1866, which allowed the United States government to bring tribes, friendly to the Cherokee Nation, into the Cherokee Outlet.<sup>47</sup>

Although the label "reservation" is not determinative, it is interesting to note that the Act of 1882, authorizing the Chilocco Indian School, does not refer to it directly as a reservation,<sup>48</sup> and neither does a bill passed by Congress in 1966, which provided for the private sale of excess Chilocco lands.<sup>49</sup> The committee report which recommended passage of the bill<sup>50</sup> included a letter from Undersecretary of the Department of the Interior, John A. Carver, in which he stated: "The Chilocco Indian Industrial School, as it was originally called, was a boarding school for friendly Indians within the Indian territory, but it is now known as the Chilocco

44. U.S. Dep't of the Interior, Executive Orders Relating To Indian Reservations 141 (1975) (Executive Order of July 12, 1884, President Chester A. Arthur).

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

46. U.S. Dep't of the Interior, Executive Orders Relating To Indian Reservations 140 (1975) (Executive Order of July 9, 1895, President Grover Cleveland), (Executive Order of July 12, 1895, President Grover Cleveland).

47. Treaty with the Cherokee Indians, 14 Stat. 799 (1866).

48. Act of May 17, 1887, ch. 163, 22 Stat. 68.

49. H.R. Res. 5380, 89th Cong., 2d Sess. (1966).

50. H.R. REP. No. 1682, 89th Cong., 2d Sess. (1966). See also T. Fischbacher, *A Study of the Role of the Federal Government in the Education of the American Indian* (1967) (Published thesis, Arizona State University), at 102-108.

Indian School and is an *off-reservation* boarding school. . . ."<sup>51</sup> Therefore, the words of grant used in establishing Chilocco Indian School are not conclusive in establishing that Chilocco is an Indian reservation.<sup>52</sup>

In addition to examining the legal history and words of grant with respect to Chilocco Indian School, there are other important factors to consider in determining whether the school constitutes an Indian reservation within the statutory definition of Indian country.<sup>53</sup> Probably the most basic consideration is the tribal aspect of an Indian reservation. In the case of *Tooisgah v. United States*,<sup>54</sup> the United States District Court for the Western District of Oklahoma noted specifically that in using the term "Indian reservation," "Congress chose language carefully designed to recognize the sovereign jurisdiction of a state unless the offense was committed in a place set apart for the government of the Indians as a tribe."<sup>55</sup> The Oklahoma Court of Criminal Appeals has also recognized the tribal character of an Indian reservation.<sup>56</sup>

Chilocco Indian School possesses none of the tribal characteristics usually found on an Indian reservation. The school was not established for the use of one tribe, even though it was in close proximity to the Ponca and Pawnee reservations.<sup>57</sup> Any "friendly Indian" within the Indian Territory, who was not otherwise provided for, could attend the school.<sup>58</sup> Today, in fact, students from several different states attend the school.<sup>59</sup> The school facilities are no longer restricted to the exclusive use of Indian students, and any non-Indian student may attend, conditional upon vacancies in the school and upon payment of tuition.<sup>60</sup> Furthermore, there is no tribal government at Chilocco which could assume jurisdiction of the school.

In addition to the tribal aspect of an Indian reservation, there are other relevant factors to be considered in determining whether Chilocco Indian School qualifies as a reservation. In *United States*

51. H.R. REP. No 1682, 89th Cong., 2d Sess. (1966) (emphasis added).

52. The Chilocco Indian School Reserve has been referred to as a "reservation" on several occasions. *Lee v. Ellis*, 16 Okla. 24, 83 P. 715 (1905); *McCalla v. Acker*, 15 Okla. 52, 78 P. 223 (1904); Act of Feb. 14, 1920, 41 Stat. 408, ch. 75, § 17; Act of June 30, 1919, 41 Stat. 3, ch. 4, § 17; Act of May 18, 1916, 39 Stat. 123, ch. 125, § 17; Act of June 21, 1906, ch. 3504.

53. 18 U.S.C. § 1151 (1970).

54. 186 F.2d 93 (10th Cir. 1950).

55. *Id.* at 99. *Contra*, *United States v. McGowan*, 302 U.S. 535 (1938).

56. *See Ellis v. State*, Okla. Cr., 386 P.2d 326, 330 (1963).

57. Act of May 17, 1887, ch. 163, 22 Stat. 68, 85.

58. *Id.* at 85.

59. H.R. Res. 5380, 89th Cong., 2d Sess. (1966).

60. 25 C.F.R. § 31.3 (1977).

*v. Myers*,<sup>61</sup> an early federal case involving the Rainy Mountain Indian School, located in Oklahoma, the Court considered the question of whether the school was Indian country within the meaning of Section 1151 of Title 18, United States Code. In holding that the school was not Indian country, the Court recognized that several related factors are involved in such a determination: "Whether a reservation for any purpose affecting Indians is of a character sufficient to stamp such lands as Indian country within the meaning of the law must depend upon the scope of the act creating it, and the nature of the title, use, and occupancy, how held, exercised and enjoyed."<sup>62</sup>

Therefore, one important indicator of a reservation is the nature of the title, use, and occupancy of the land in question. In *Myers*, the Court states:

The term [Indian country] does not apply to any tract owned and controlled by the government and devoted by it, whether as a so-called reservation or mere foundation, to the benefit of the Indians, exclusively or otherwise, unattended by any semi-independent use and occupancy involving such title, ownership, and control as has always inhered in the Indians as a distinct people and not merely as individual wards.<sup>63</sup>

When the land on which the school is located was purchased from the Cherokee Nation, title was vested in the United States government, and no Indian tribe retained any interest in the land.<sup>64</sup> In creating the Chilocco Indian School Reserve, the government retained title to the lands comprising the reserve and merely granted the use and occupancy to certain individual Indians.<sup>65</sup> It is evident from the words of grant that individual Indians are entitled to the title, use, and occupancy of the lands for a specific limited purpose.<sup>66</sup> This grant of land for a limited use has more of the characteristics of treatment of Indians as individual wards and not as a semi-autonomous, distinct people, as described in the *Myers* case. In short, the language of the Court in *Myers*, in an analogous situation, is equally applicable to the instant case: "It follows that this setting apart of a limited tract of the public do-

61. 206 F. 387 (8th Cir. 1913).

62. *Id.* at 394.

63. *Id.*

64. Treaty with the Cherokee Indians, 14 Stat. 799 (1866).

65. U.S. Dep't of the Interior, Executive Orders Relating To Indian Reservations 141 (1975) (Executive Order of July 12, 1884, President Chester A. Arthur).

66. *Id.*

main for a school which the government devoted mainly, or even entirely, to the training and education of Indian children, attending in their individual capacity, could not operate to convert that tract into Indian country . . . .<sup>67</sup>

Another factor to be considered is the actual treatment of the school by Congress and the executive branch. A true Indian reservation is land which has been reserved for the exclusive use of Indians, although actual occupation is not necessary for that status.<sup>68</sup> Originally, the Chilocco lands were reserved from other lands in the Cherokee Outlet for the purpose of educating and housing students and graduates of the school to be built thereon.<sup>69</sup> However, over the past forty years the federal government has altered the use of the property several times. In 1937, an Indian homestead project was initiated on the property.<sup>70</sup> In 1946, a proposal was made concerning the abandoned homesteads and the establishment of agricultural plots for students at Chilocco.<sup>71</sup> Finally, in 1966, Congress passed an act allowing for the sale of excess school lands back to the Cherokee Indians.<sup>72</sup> None of these actions appeared to recognize any property right in any particular tribe or individual Indian. In fact, the federal government could even discontinue the operation of the school without the consent of any Indian tribe or individual because there is no agreement or treaty which gives any Indian an enforceable right to challenge such action.<sup>73</sup>

Considering all the relevant factors, then, it appears that the Chilocco Indian School is not Indian country within the meaning of Section 1151, although there is evidence to the contrary. Although the school is not Indian country, the fact that the Oklahoma constitution contains an express disclaimer of jurisdiction over Indian lands,<sup>74</sup> which was required by Congress as a condition of admission to the Union, does not limit the state's authori-

67. 206 F. 387, 394 (8th Cir. 1913).

68. *United States v. Martin*, 14 F. 817, 822 (D.C. Ore. 1883).

69. U.S. Dep't of the Interior, *Executive Orders Relating To Indian Reservations* 141 (1975) (Executive Order of July 12, 1884, President Chester A. Arthur).

70. 5 C. KAPPLER, *INDIAN AFFAIRS—LAWS AND TREATIES* 643 (1941) (Executive Order No. 7546, President Franklin D. Roosevelt, Feb. 1, 1937).

71. Memorandum Letter from the Secretary of the Dep't of the Interior to the President of the U.S. Senate (Jan. 25, 1946).

72. H.R. Res. 5380, 89th Cong., 2d Sess. (1966).

73. A recent article in *The Daily Oklahoman*, p. 1, Jan. 23, 1978, quoted Forrest J. Gerard, Assistant Secretary for Indian Affairs, U.S. Dep't of the Interior, as saying that the future of off-reservation schools, including Chilocco, is bleak due to decreasing enrollment and rising costs.

74. OKLA. CONST. art. I, § 3.

ty to exercise criminal jurisdiction over the school.<sup>75</sup> However, assuming *arguendo* that Chilocco Indian School was Indian country during the period in which Oklahoma was divided into Oklahoma Territory and Indian Territory, there is evidence that Chilocco is no longer under exclusive federal jurisdiction.

Upon creation of Oklahoma Territory and the Indian Territory under the Act of May 2, 1890,<sup>76</sup> the United States district courts in both territories were given jurisdiction over crimes committed by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens.<sup>77</sup> These district courts had a dual role. As United States courts they enforced the federal laws, and as territorial courts they enforced the territorial laws,<sup>78</sup> which at the outset were the laws of Nebraska in the Oklahoma Territory<sup>79</sup> and the laws of Arkansas in the Indian Territory.<sup>80</sup> As United States courts, they had jurisdiction over crimes committed by white persons against either Indians or other persons.<sup>81</sup> As territorial courts, they lacked jurisdiction over acts committed by Indians of the same tribe.<sup>82</sup>

In 1897, this situation was completely altered. The Act of 1897<sup>83</sup> placed in the United States territorial courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas were made to apply to all persons, regardless of race. Once the tribal jurisdiction was abolished,<sup>84</sup> the essential characteristics of Indian country were eliminated. This conclusion is supported by the grant of citizenship to every Indian in Indian Territory<sup>85</sup> and by the last proviso in the Act of May 8, 1906,<sup>86</sup> which provided that the Indians in Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. Upon the organization of the state of Oklahoma,<sup>87</sup>

75. Clinton, *supra* note 1, at 564, states: "The requirement of congressional consent to the exercise of state jurisdiction applies only to jurisdiction over crimes committed within Indian country. The states have jurisdiction regardless of a disclaimer provision, by virtue of their admission to the Union on an equal footing with sister states, over crimes committed by or against Indians outside of Indian lands."

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

77. *Id.* at 26 Stat. 88, 97.

78. *Brown v. United States*, 146 F. 975, 976 (8th Cir. 1906).

79. Act of May 2, 1890, ch. 182, § 11, 26 Stat. 81, 87.

80. *Id.* at 26 Stat. 94.

81. *Brown v. United States*, 146 F. 975 (8th Cir. 1906).

82. Act of May 2, 1890, ch. 182, 26 Stat. 81, 88, 97.

83. Act of June 7, 1897, ch. 3, 30 Stat. 62, 83.

84. *Id.*

85. Act of Mar. 3, 1901, ch. 869, 31 Stat. 1447.

86. Act of May 8, 1906, ch. 2348, 34 Stat. 182.

87. Act of June 16, 1906, ch. 3335, § 19, 34 Stat. 267, 177.

the state courts succeeded to the jurisdiction of the territorial courts. The state courts apparently acquired criminal jurisdiction over all Indians in the former Indian Territory.<sup>88</sup> Because Chilocco was clearly part of Indian Territory, the Oklahoma state courts appear to have concurrent jurisdiction over criminal matters arising on the school grounds.

### *Concurrent Jurisdiction*

Although Chilocco Indian School apparently is not properly classified as Indian country, it is located on land in the federal public domain.<sup>89</sup> However, there is authority to support the contention that Oklahoma state courts have jurisdiction to prosecute crimes committed on the federal public domain.<sup>90</sup>

The case of *State v. Cline*<sup>91</sup> is the leading decision on this issue in Oklahoma. In this case, the court considered the issue of exclusive federal jurisdiction over land within the boundary of a state and concluded that in the absence of a specific reservation of federal jurisdiction, the rights of the United States government are only proprietary in nature. It is clear from a reading of Section 7 of the Oklahoma Enabling Act<sup>92</sup> that no express reservation was made by the federal government of the land now in question. The state of Oklahoma has never relinquished that jurisdiction by consent or cession, and, therefore, the federal government has less than exclusive jurisdiction over the public domain unless and until Congress makes a determination that it will deal exclusively with the subject.<sup>93</sup>

In 1957, and again in 1962, the General Services Administration undertook the task of compiling an inventory concerning the jurisdiction of all federally owned land in the United States.<sup>94</sup> In that survey, Chilocco Indian School is considered to be only proprietary property.<sup>95</sup> A proprietary interest, as defined by the

88. *Ex parte Nowabbi*, 60 Okla. Cr. 111, 61 P.2d 1139 (1936).

89. G.S.A. Circular No. 275, p. 628 (1962).

90. *DeMarrias v. State*, 319 F.2d 845, 846 (8th Cir. 1963).

91. 322 P.2d 208 (Okla. Cr. App. 1958). The *Cline* case was the controlling opinion cited by the Field Solicitor of the Tulsa, Oklahoma Regional Office, Bureau of Indian Affairs, to the District Commander, Oklahoma Highway Patrol, Lawton, Okla., in a 1972 opinion concerning jurisdiction over Chilocco Indian School. The same conclusion had been reached several years before, in 1967, in an agreement between the United States Attorney B. Andrew Potter, and the Acting Regional Solicitor, Dep't of the Interior, Tulsa, Oklahoma Region, Lewis J. Bicking.

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

93. *Texas Oil & Gas Corp. v. Phillips Pet. Co.*, 406 F.2d 1303 (10th Cir. 1969); *Texas Oil & Gas Corp. v. Phillips Pet. Co.*, 277 F. Supp. 366 (W.D. Okla. 1967).

94. G.S.A. Circular No. 275 (1962).

95. *Id.* at 628.

General Services Administration, is one wherein the federal government has acquired some right of title to an area in a state, but has not obtained any measure of the state's authority over the area.<sup>96</sup> Therefore, the state of Oklahoma can claim criminal jurisdiction over Chilocco Indian School on the basis of agency classifications and agreements, even though Chilocco is part of the federal public domain. Therefore, there is evidence that the state of Oklahoma and the United States government have concurrent jurisdiction over the Chilocco Indian School.

### *Conclusions and Recommendations*

The Chilocco Indian School and the land on which it is located do not constitute Indian country within the meaning of Section 1151 of Title 18 of the United States Code. Although the evidence is conflicting, consideration of the circumstances suggests that the Chilocco Indian School Reserve is not an Indian reservation. Such circumstances include (1) the fact that there is no tribal organization at Chilocco; (2) no individual Indian or tribe has any legally binding authority to continue or discontinue the present use of Chilocco; (3) the school was created by congressional action, and not as the result of a treaty or other agreement with an Indian tribe or Indian community; and (4) the treatment of the lands involved has been inconsistent with usual treatment of lands belonging to Indian reservations or individual Indians. Any past claim that Chilocco was Indian country was dissolved when Indian Territory became part of the state of Oklahoma.

Although part of the federal public domain, Chilocco Indian School is classified as proprietary and, therefore, the state of Oklahoma has concurrent jurisdiction over the area.

This concurrent jurisdiction can pose potential multiple prosecution problems if both the state and federal governments choose to exercise jurisdiction over the area. The double jeopardy clause of the fifth amendment to the United States Constitution does not prevent such multiple prosecutions.<sup>97</sup> Multiple prosecutions would certainly be an undesirable consequence of concurrent jurisdiction, and state and federal officials should work together to avoid this danger.

The confusion which exists today over which unit of government has the authority to police Indian schools such as Chilocco can lead to two undesirable situations. First, it is undesirable to

96. *Id.* at 12.

97. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkas v. Illinois*, 359 U.S. 121 (1959).

have any unit of government policing the schools if it is ill-equipped to manage the unique law enforcement problems of an Indian school. Second, confusion over jurisdiction can lead to a legal vacuum in which there is no law enforcement.

It is clear that Indian schools must be protected from crime.<sup>98</sup> However, the proper unit of government to handle this task is not clear. On one hand, the Bureau of Indian Affairs has an obligation to insure law enforcement at Indian schools in order to protect individuals and property from harm. On the other hand, the District Attorney's office in Kay County, Oklahoma, has assumed jurisdiction over Chilocco at the present time. Perhaps the best solution would be for the federal government to commission Indian police officers with the powers of arrest at Indian schools.<sup>99</sup> In any event, sensible law enforcement services must be provided to Indian schools without constituting an undue interference with the educational process.

98. In *The Daily Oklahoman*, May 26, 1977, p. 57, Mary McCormick, elected principal chief of the Sac and Fox, was quoted as saying of the lack of law enforcement at Indian schools in Oklahoma, "We need protection . . . Last Thursday night, 13 people entered our land and did \$5,000 to \$6,000 in damage . . . The city and county people are arguing jurisdiction, while the people who did the vandalism are getting away."

99. Authority currently exists for the B.I.A. Indian Police. 25 C.F.R. § 11.301-.306 (1977). However, this applies only to reservations.

