United States Department of the Interior

OFFICE OF THE SOLICITOR

AUG 16 1996

M-36985

Memorandum

To: Secretary

From: Solicitor

Subject: Whether the Circle of Nations Wahpeton Indian School Campus Constitutes "Indian Country"

The North Dakota Attorney General, the School Board for the Circle of Nations School (formerly Wahpeton Indian School), and the North Dakota congressional delegation have all requested a legal opinion regarding the Department of the Interior's position on whether the Circle of Nations School (CNS) is located in "Indian country," as defined in 18 U.S.C. § 1151.

For the following reasons, I conclude that the CNS campus does not, at this time, constitute a "dependent Indian community" and is, therefore, not "Indian country."

BACKGROUND

In 1904 Congress directed establishment of the Wahpeton Indian School by instructing the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, to purchase land and erect buildings and other improvements with a $100,000 appropriation. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 215. This Act required the school to be for an Indian agricultural farm and stock-raising, "under the supervision and direction of the Commissioner of Indian Affairs, and in all respects in conformity with such conditions, rules, and regulations as to the conduct and methods of instruction and expenditure of money as may be from time to time prescribed by him . . . ." Id. at 216.

The School is located on 52 acres of land purchased for that purpose. Since its establishment in 1908, the lands and facilities have been used for the sole purpose of educating Indian children. The School currently serves students in the fourth through eighth grade level. In 1982, the United States District Court for the District of Columbia described the school's objective as reflecting "the broader needs of elementary level Indian students in today's society. The School educates Indian children, provides home care, a community environment, and a social living situation." Omaha Tribe of Nebraska v. Watt, 9 Ind. L. Rep. 3117, 3117 (D.D.C. July

2, 1982). According to a recent summary submitted in a case involving the school, Allery v. Hall, No. 93-280 (Richland County District Court, North Dakota), all students at the school are American Indians and the staff is about 80% American Indian.

The Bureau of Indian Affairs (BIA) administered the School until July 1993, when control was transferred to the Wahpeton Indian School Board, Inc., a tribal corporation chartered by the Red Lake Band of Chippewa Indians for the purpose of operating the school. The BIA currently funds the operation of the School by providing a multi-million dollar grant to the School Board. The education grant is awarded under the terms of the Tribally Controlled Schools Act of 1988, Pub. L. 100-297, Title V, Part B; 25 U.S.C. §§ 2501-2511. The State of North Dakota provides no funds toward the operation of the CNS.

DISCUSSION

The term "Indian country" is a legal term of art with important implications concerning the authority of tribal, state and federal governments to regulate activities and prohibit conduct over a given geographic area. Whether the CNS campus constitutes "Indian country" determines the jurisdictional authority that tribal, state and federal entities may exercise over the campus. For most purposes, Indian country is beyond the reach of state civil and criminal jurisdiction. With respect to criminal jurisdiction in Indian country, whether a given offense is subject to federal, tribal or state jurisdiction is dependent upon the Indian or non-Indian status of the accused and victim, as well as the nature of the offense. The State exercises jurisdiction over all crimes committed by non-Indians against other non-Indians, while the federal government and tribes generally exercise concurrent jurisdiction over misdemeanors committed by Indians. The federal government exercises jurisdiction over most major crimes committed by or against Indians. Civil jurisdiction in Indian country is generally left to the tribe governing the area. See generally F. Cohen, Handbook of Federal Indian Law 281-380 (1982 ed.).

The development of the term "Indian country"

The definition of Indian country has had a somewhat convoluted history, involving an ongoing interplay among the Congress, the courts, and the Executive. The first definition was set forth by Congress in the Indian Intercourse Acts of the late eighteenth and early nineteenth centuries. The Indian Intercourse Act of 1834, § 1, 4 Stat. 729, defined "Indian country" as all lands west of the Mississippi River not within the confines of Arkansas Territory or the States of Missouri and Louisiana, and all lands east of the

Mississippi River in which Indian title had not been extinguished.[1] The definition in this Act remained law until 1874, when the compilers of the Revised Statutes omitted and effectively repealed it. Compare id. with R.S. § 5596 (effective June 22, 1874) and R.S. tit. 28, ch. 4, §§ 2127-2157. Deprived of a statutory definition to use in interpreting various laws referencing "Indian country," the courts set out to define the term.

In Bates v. Clark, 95 U.S. 204, 207 (1877), the Supreme Court determined that, despite its repeal, the 1834 definition should still control. Thirty-six years later, the Court expanded the definition in Donnelly v. United States, 228 U.S. 243 (1913). There the Court addressed whether federal jurisdiction extended to a major crime committed on lands set aside from the public domain by executive order for use as an Indian reservation. The executive order reservation in question was located in an area of California where aboriginal title had been extinguished. Affirming the conviction, the Court stated "nothing can more appropriately be deemed 'Indian Country,' . . . than a tract of land that, being part of the public domain, is lawfully set apart as an Indian reservation." 228 U.S. at 269. Accordingly, whether the tract in question was Indian country turned on whether it had been "lawfully set apart" by the federal government for Indians.

Later that same year, the Court decided in United States v. Sandoval, 231 U.S. 28 (1913), that Pueblo communities were Indian country. The Court examined both Pueblo communities and their lands, which they held communally in fee, rather than being federally owned and reserved for their use. The Court noted that Pueblo communities "requir[e] special consideration and protection, like other Indian communities," id. at 39, and "are dependent upon the fostering care and protection of the government, like reservation Indians in general," id. at 41. Court held that the federal government's duty to tribes extended beyond the scope of formal reservations, to include' these "dependent Indian communities." Id. at 46.

The next year, the Court addressed whether a trust allotment was "Indian country" for purposes of the Indian Country Crimes Act, R.S. 2145, now codified at 18 U.S.C. § 1152. United States v. Pelican, 232 U.S. 442 (1914). Answering in the affirmative, the Court stated that the test was whether the land "had been validly set apart for the use of the Indians as such, under the superintendence of the government." Id. at 449. This last clause,

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[1] Prior to passage of this Act, the Supreme Court ruled that lands whose title was extinguished by treaty would not be considered Indian country for purposes of the Trade and Intercourse Act of 1802, 2 Stat. 139. American Fur Co. v. United States, 27 U.S. (2 Pet.) 358 (1829).

that the land not only be set apart but "under the superintendence" of the federal government, was an addition to Donnelly. Likewise, in United States v. Ramsey, 272 U.S. 467 (1926), the Court held that a restricted fee allotment is Indian country.

The next relevant Supreme Court decision came in United States v. McGowan, 302 U.S. 535 (1938), where the Court addressed whether the Reno Colony in Nevada was "Indian country." The federal government purchased the Reno Colony land "to provide lands for needy Indians scattered over the State of Nevada." Id. at 537. Concluding that these trust lands constituted "Indian country," the Court stated,

> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the government. The government retains title to the lands which it permits the Indians to occupy. The government has authority to enact regulations and protective laws respecting this territory. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." United States v. Ramsey, [271 U.S. 467, 471 (1926)].
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> When we view [these facts] in light of the relationship which has long existed between the government and the Indians--and which continues to date--it is not reasonably possible to draw any distinction between this Indian "colony" and "Indian country."

302 U.S. at 539 (footnotes omitted).

More than a century after its first attempt, in 1948 Congress once again legislated a definition of "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, 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 the 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.

18 U.S.C. § 1151. While this definition appears in a criminal statute, the Supreme Court has expressly applied it to questions of civil jurisdiction as well. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); see also California v. Cabazon Band of

Mission Indians, 480 U.S. 202, 207 n.5 (1987) (citing DeCoteau with approval). Furthermore, Congress has used the Section 1151 definition in civil as well as criminal statutes specific to Indians. See, e.g., Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(10) (defining "reservation" to include "Indian country" as defined in Section 1151); Indian Law Enforcement Reform Act of 1990, 25 U.S.C. § 2801(4) (cross-referencing definition in Section 1151); Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(8) (same).[2]

It is generally acknowledged, and the legislative history shows, that Congress essentially incorporated prior Supreme Court decisions when it codified the current definition. See F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.). The reviser's note to 18 U.S.C. § 1151 states that the "[d]efinition is based on [the] latest construction of the term by the United States Supreme Court in U.S. v. McGowan . . . , following U.S. v. Sandoval . . . (See also Donnelly v. U.S. and Kills Plenty v. U.S. . . .)." 18 U.S.C. § 1151 Historical and Revision Notes (citations omitted). The note also states that "Indian allotments were included on the authority of the case of U.S. v. Pelican . . . ." Id. (citation omitted).

Application of 18 U.S.C. § 1151 to CNS

The CNS campus is neither an Indian reservation (see § 1151(a)), nor an Indian allotment (see § 1151(c)). Therefore, the campus constitutes Indian country only if it is a "dependent Indian community," as that term is used in subsection (b). The statute does not define what constitutes a "dependent Indian community." Accordingly, the courts have undertaken the task of developing an analytical framework for determining whether land in question is a "dependent Indian community" and therefore Indian country under section 1151(b).

The Eighth Circuit Court of Appeals, whose jurisdiction covers the area where CNS is found, has identified four factors relevant to deciding whether a given area is a "dependent Indian community" pursuant to section 1151(b):

> (1) whether the United States has retained 'title to the lands which it permits the Indians to occupy' and 'authority to enact regulations and protective laws respecting this territory,' (2) 'the nature of the area

[2] In a case involving the scope of the State of North Dakota's jurisdiction over the CNS campus, a state trial court held that section 1151 is limited to criminal law. Allery v. Hall, No. 93-280 (Richland County District Court, North Dakota, March 10, 1994). No appeal was taken, and the United States was not a party to and did not appear as amicus curiae in this litigation.

> 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,' (3) whether there is 'an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,' and (4) whether such lands have been set apart for the use . . . of dependent Indian peoples.

United States v. Driver, 945 F.2d 1410, 1415 (8th Cir. 1991) (quoting United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982) (citations omitted)).

The Tenth Circuit Court of Appeals has explicitly adopted the Eighth Circuit's four-prong test. See Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1545 (10th Cir. 1995). The Ninth Circuit has adopted a similar, albeit six-part, inquiry for determining whether an area constitutes a dependent Indian community within the meaning of section 1151(b):

> 1) the nature of the area; 2) the relationship of the area inhabitants to Indian tribes and the federal government; 3) the established practice of government agencies toward that area; 4) the degree of federal ownership and control over the area; 5) the degree of cohesiveness of the area inhabitants; and 6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

Alaska v. Native Village of Venetie, 856 F.2d 1384, 1391 (9th Cir. 1988) (Venetie I) (citing United States v. South Dakota, 665 F.2d 837, 839-43 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982) and United States v. Martine, 442 F.2d 1022, 1023-24 (10th Cir. 1971)). The Ninth Circuit observed that "the ultimate conclusion as to whether an Indian community is Indian Country is quite factually dependent." Venetie I, 856 F.2d at 1391; see also Narragansett Indian Tribe v. Narragansett Electric Co., Nos. 95-1944, 95-1945, 1996 WL 396546 (1st Cir. July 22, 1996) (incorporating Martine and South Dakota factors).

We now examine each of the Eighth Circuit's four factors as applied to the CNS campus.

1. Title to the land and authority to enact regulations and protective laws concerning the land.

The United States purchased the CNS campus for the purpose of establishing an Indian school. The United States still holds title to the land (though in fee rather than in trust). It is indisputable that numerous federal Indian statutes apply to the CNS campus. See, e.g., the Indian Self-Determination and Education

Assistance Act, 25 U.S.C. § 450 et seq.; the Johnson O'Malley Act of 1934, 25 U.S.C. § 452 et seq.; the Indian Education Act, 25 U.S.C. § 2001 et seq.; the Tribally Controlled Schools Act, 25 U.S.C. § 2501 et seq.; the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3201 et seq. These facts make clear that the federal government retains "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory." Accordingly, the first factor favors a finding of a "dependent Indian community."

2. Nature of the area in question, relations of inhabitants, and established practices of government agencies.

Established by the United States for the education of Indian students, the CNS is located on a discrete campus cf approximately 52 acres. The school was administered by BIA for more than eight decades, but since 1993 has been administered by a school board chartered under the laws of the Red Lake Band of Chippewa Indians. The School Board is comprised of tribal council members from the five tribes with the largest number of tribal members enrolled at the School.[3] All of the students are enrolled members of federally-recognized tribes.[4] The School's sole source of funding is the United States. Presently, the BIA provides funds for the operation of the CNS under a grant awarded to the School Board pursuant to the Tribally Controlled Schools Act. All of these facts also favor the finding of a "dependent Indian community."

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[3] Because the grant to the School Board benefits more than one Indian tribe, the Tribally Controlled Schools Act required "approval of the governing bodies of Indian tribes representing 80 percent of the students" attending the CNS. 25 U.S.C. § 2511(3) (B). In satisfaction of this provision, the following tribes passed resolutions approving the grant: Red Lake Band of Chippewa Indians (Res. Nos. 33-92, 47-93), Menominee Indian Tribe of Wisconsin (Res. No. 93-l0), Fort Peck Tribal Executive Board (Res. No. 367-92-1), Devils Lake Sioux Tribe (Res. No. A05-93-133), Turtle Mountain Band of Chippewa Indians (Res. No. 4560-11-91), Fort Belknap Community Council (Res. No. 38-93), Standing Rock Sioux Tribe (Res. No. 23-92), Blackfeet Nation (Res. No. 131-93), Shoshone-Bannock Tribes (Res. No. FHBC-93-0286), White Earth Reservation Tribal Council (Res. No. 00l-93-030), Leech Lake Tribal Council (Res. No. 93-92), Oneida Tribe of Indians of Wisconsin (Res. No. 3-17-93-B), and Bad River Band of Lake Superior Tribe of Chippewa Indians (Res. No. 3724-93-26).

[4] Many of the students enrolled at CNS attend the school at the direction of tribal courts, tribal social services agencies or BIA social services agencies.

The closest Indian reservation to the CNS is the Sisseton-Wahpeton Lake Traverse Indian Reservation approximately 60 miles away. Currently there is no evidence of a tribal governmental presence in the community that enforces tribal law.

Another relevant inquiry is the established practice of the federal government towards the area. A 1940 Memorandum from the Acting Solicitor to the Commissioner of Indian Affairs addressed whether lands purchased by the United States for Indian schools and hospitals constituted "Indian country" or "Indian reservations" for purposes of statutes providing federal jurisdiction over crimes within Indian country or Indian reservations. See Memorandum from Frederic L. Kirgis, Acting Solicitor to Commissioner of Indian Affairs (July 9, 1940), 1 Op. Sol. on Indian Affairs 964-65 (U.S.D.I. 1979) (hereafter Kirgis memorandum). The Kirgis memorandum concluded that such lands cannot be Indian country or an Indian reservation "unless an Indian tribe or group has occupancy rights on the land." Id. at 964.

The Kirgis memorandum was issued eight years prior to the enactment of the definition of "Indian country" into law, including its provision for "dependent Indian communities." It was also well before judicial development of a test for what constitutes a "dependent Indian community" under 18 U.S.C. § 1151(b). The intervening legislative and judicial developments limit its relevance to the legal issue before us. Nevertheless, the Kirgis memorandum does reflect a relevant concern, discussed in more detail below, about classifying as Indian country schools, hospitals, or other institutions operated primarily or exclusively for the benefit of Indians of numerous tribes, and geographically far removed from any reservation.

In 1966 and again in 1992, local Assistant United States Attorneys expressed the view that the State 'rather than the federal government or any tribe had jurisdiction over civil and criminal matters at the school. See Letter from Richard V. Boulger, Assistant United States Attorney to Wallace G. Dunker, Field Solicitor (July 7, 1966); Letter from Gary Annear, First Assistant United States Attorney to Earle R. Myers, Richland County States Attorney (Oct. 6, 1992). The earlier letter noted that the State assumed jurisdiction over students who run away from the school, and that there was apparently no instance where the United States prosecuted someone in the previous 13 years "merely because the action occurred on the site of the Wahpeton Indian School." Neither letter explicitly discusses whether the CNS campus constituted "Indian country."

Another consideration is relevant to assessing this factor. As noted earlier, jurisdiction in Indian country is complex, overlapping among tribal, federal and state governments depending upon the factual context. The federal government rarely has

exclusive jurisdiction; instead, its authority is. usually concurrent with the tribal government. The marked trend, moreover, is for tribal jurisdiction to play an increasingly important role, as all three branches of the federal government have, in modern times, emphasized tribal self-governance and the authority of tribal lawmaking. See, e.g., Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq.; the Tribal Self-Governance Act, 25 U.S.C. § 458aa et seq.; President's Remarks to American Indian and Alaska Native Tribal Leaders, 30 Weekly Comp. Pres. Doc. 941 (Apr. 29, 1994); Memorandum from President Clinton to Heads of Executive Departments and Agencies on Government-to-Government Relations with Native American Tribal Governments (April 28, 1994).

In the vast majority of cases of uncertainty whether Indian country exists, there is no doubt that an identifiable tribal government could exercise jurisdiction over the land in question under principles of federal Indian law. Here, by contrast, no tribal government is in a position to exercise jurisdiction over the CNS campus. This unusual circumstance - the lack of an identifiable tribal infrastructure or presence in the community that enforces tribal law - is a relevant fact to apply in determining whether a dependent Indian community exists on the campus. Cf., e.g., United States v. Driver, 945 F.2d 1410, 1412 (8th Cir. 1991) (noting that the defendant was arrested on tribal charges and held in a tribal jail; defendant unsuccessfully argued that location of incident was not Indian country); United States v. South Dakota, 665 F.2d 837, 840 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982) (specifically noting the presence of tribal law enforcement and tribal court jurisdiction over activities within the given area); see also United States v. Mound, 447 F. Supp. 156, 159 (D.S.D. 1979) (observing activities of tribal court with respect to the area and the applicability of tribal ordinances to the area).

At CNS there is a strong Indian presence, but the campus is not under the jurisdiction of any tribe; indeed, it is geographically considerably removed from any reservation. The fact that no tribe exercises criminal jurisdiction over activities at the school would create, to some extent, a jurisdictional vacuum were the campus determined to be Indian country. This is due to a general limitation, to only certain "major" crimes, in the exercise of federal jurisdiction over crimes committed in Indian country by one Indian against the person or property of another Indian. See 18 U.S.C. §§ 1152-53. Thus, acts that would be misdemeanors under federal or state law would, when committed by one Indian against another, go unprosecuted if the campus were determined to be Indian country, and no tribe had authority to exercise criminal jurisdiction over the campus. Of course, if a tribe did have jurisdiction over the campus, it could choose for itself what kinds of acts to define as misdemeanors. That would not be a

jurisdictional vacuum, but rather the exercise of a sovereign's choice. Here, however, the absence of a tribe exercising jurisdiction over the campus creates the jurisdictional vacuum.

There may be other situations as well where the lack of tribal jurisdiction might create a jurisdictional or regulatory vacuum. Furthermore, even where federal jurisdiction might be exercised, the practical realities are, and the historic record shows, that the federal government does not always steadfastly or assiduously exercise such jurisdiction. As a practical matter, for example, the U.S. Attorney's office will likely not be able to devote many resources to prosecuting other misdemeanors.

Taken together, these considerations favor a finding that the campus does not constitute a "dependent Indian community."

3. Cohesiveness manifested by economic oursuits, common interests, or needs of the inhabitants.

All who work at the CNS pursue the common interest of providing for the education of Indian children. Nearly 80% of the CNS staff is American Indian and some of the staff members also live in on-campus housing with their families.[5] The Indian children share the common pursuit of an education in an environment tailored to their special needs. As noted by the District Court for the District of Columbia, the School is designed to meet

> the broader needs of elementary level Indian students in today's society. The school educates Indian children, provides home care, a community environment, and a social living situation. . . .
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> . . . . The school provides these students with elementary level instruction and also makes available other personnel to serve the special needs of those students who have had difficulty in achieving their potential and those with learning difficulties requiring more specialized assistance. The students' living needs are also provided for. A staff nurse is available on campus, as is a dorm counselor. Cultural activities are regularly conducted at the school.

Omaha Tribe of Nebraska v. Watt, 9 Ind. L. Rep. 3117, 3119 (D.D.C. July 2, 1982) (holding that tribes with members in attendance at the Wahpeton Indian Boarding School have a statutory right to meaningful consultation before school may be closed).

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[5] The CNS currently employs 90 staff members. The CNS does provide some on-campus housing for staff members and their families. Of the fifteen staff members currently living in on-campus housing, fourteen are American Indian.

The State has argued that the requisite element of cohesiveness is lacking because the students and staff are enrolled members of various tribes from across the country, they often spend vacations and holidays apart, no single tribal government provides "a multitude of services" to the community, and many of the essential services are provided by the local government. See Brief of Amicus State of North Dakota at 17-18, Allery v. Hall, No. 93-280 (Richland County District Court, North Dakota) (filed Dec. 30, 1993) (citing United States v. Driver, 945 F.2d 1410, 1415 (8th Cir. 1991)).

This is a close question. A school is a "community" in a basic sense, but with the single focus of education. Here, however, the student and teacher population is drawn from different Indian tribes and communities. The narrow focus and the absence of a single tribal core leaves room to doubt whether there is a sufficient "element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality." United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1982), cert. denied, 459 U.S. 823 (1982); but see United States v. Mound, 447 F. Supp. 156, 160 (D.S.D. 1979) (dependent Indian community test "must be a flexible one, not tied to any single standard," resulting in a holding that a housing project was a "dependent Indian community" in part because the community had "close ties with the federal government . . . with federal money spent for its benefit for water, sewer, roads, medical services, and a portion of its educational needs").

4. Area set apart for the use of dependent Indian peoples.

Congress explicitly appropriated monies for the purchase of the land and the construction of the school. The 52 acre campus has never been used for purposes other than an Indian education institution.[6] As noted earlier, the land is held by the United States in fee rather than in trust. Most lands found to be Indian country are held in trust by the federal government for Indians. See, e.g., Donnelly, Pelican and McGowan, supra. Nevertheless, no court has held that a dependent Indian community can be found only on lands held in trust for Indians. Cf. United States v. Sandoval,

[6] The State noted in its Amicus Brief that the federal government has sold a sizable portion of the land originally purchased. See Brief of Amicus State of North Dakota at 18, Allery v. Hall, No. 93-280 (Richland County District Court, North Dakota) (filed Dec. 30, 1993). The State argued that this supports an inference that the federal government never intended to "set apart" the campus. The courts have long recognized that the United States may take a portion of lands previously set aside for Indians for other purposes, see, e.g., Solem v. Bartlett, 465 U.S. 463, 470 n.11 (1984), but here the land retained is still being used for the purpose for which it was acquired - as an Indian school.

231 U.S. 28 (1913) (communal lands held by Pueblo in fee simple constitute a dependent Indian community); United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971) (off-reservation Navajo lands held in fee simple constitute a dependent Indian community).

The School has been under the superintendence of the federal government since its establishment. As noted earlier, it is funded by a federal grant and administered by a multi-tribal School Board.[7] These facts support a determination that the CNS campus has been set apart for the use of dependent Indian peoples and favor a finding that the campus is a "dependent Indian community."

CONCLUSION

Based on the Eighth Circuit's four-pronged totality of the circumstances test, I am persuaded that the unusual circumstances here -- the multi-tribal character of the school, its remoteness from a particular reservation, and the absence of a specific tribal jurisdictional presence -- counsel against finding that the CNS campus is a "dependent Indian community." This conclusion is confined to these circumstances; specifically, I do not mean to suggest that the test for a dependent Indian community should, in the typical case where the area in question is specifically linked to a single tribe or reservation, depend upon whether the tribe had an infrastructure and actual law enforcement presence in the area.

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[7] The School Board in conjunction with the CNS superintendent perform numerous functions essential to the school's operation, including budget preparation and execution, production and maintenance of personnel handbooks and handbooks delineating student rights and acceptable student conduct, enforcement of student discipline, contract execution, and employee hiring and firing. The Tribally Controlled Schools Act provides the School Board with a fair amount of flexibility in its use of grant monies to administer the CNS. While certain portions of the grant monies may be restricted for certain purposes, see 25 U.S.C. §§ 2503(a)(3)(C), 2504 (requiring that certain grant monies be kept in separate accounts and/or be used only for the specified purpose), the School Board has broad discretion in the use of the funds to defray expenditures for "education-related activities" and "operation and maintenance," see id. § 2503 (a) (3) (A)-(B). The School Board must submit an annual financial statement and a biannual financial audit, an annual accounting of the number of students served, a description of the programs offered under the grant, and a program evaluation conducted by a neutral entity. Id. § 2506(b). The Secretary retains the power to revoke the grant eligibility determination and to reassume control over the CNS pursuant to 25 U.S.C. § 2506(c), should certain deficiencies exist and the School Board not undertake adequate remedial action.

Further, since the application of the test is dependent upon particular facts and circumstances, a change in those facts and circumstances could change the result.

My conclusion means that, for now, the State may exercise civil and criminal jurisdiction over it, to the extent that such exercise does not conflict with federal law.[8] I would expect the state to exercise jurisdiction with sensitivity to the special circumstances here, and I would hope the school governing board and the state can work out suitable arrangements that reflect these circumstances.

This Opinion was prepared with the substantial assistance of Christopher Karns, and benefited from helpful comments by Robert Anderson, Tim Vollmann, Vernon Peterson, Marcia Kimball, and Priscilla Wilfahrt.

John D. Leshy

[8] This opinion does not delineate 'the circumstances under which such conflicts may exist. A standard preemption analysis would be utilized to resolve any conflicts that may arise. See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).