OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1253

TITLE HERMAN S. SOLEM, WARDEN, AND MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, Petitioners v. JOHN BARTLETT

PLACE Washington, D. C.

DATE December 7, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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HERMAN S. SOLEM, WARDEN, AND MARK :
V. MEIERHENRY, ATTORNEY GENERAL :
OF SOUTH DAKOTA, :
Petitioners :
v. : No. 82-1253
JOHN BARTLETT :

- -x

Washington, D.C.

Wednesday, December 7, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:29 p.m.

APPEARANCES:

MARK V. MEIERHENRY, ESQ., Attorney General of South Dakota, Pierre, South Dakota; on behalf of the Petitioner.

TOM D. TOBIN, ESQ., Winner, South Dakota; on behalf of the amici curiae.

ARLINDA LOCKLEAR, ESQ., Washington, D.C.; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Attorney General, I think you may proceed when you are ready.

ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.,

ON BEHALF OF PETITIONER

MR. MEIERHENRY: Mr. Chief Justice, and may it please the Court:

This is another Eigth Circuit case and the procedural history is basically that there was an en banc hearing in 1982 before all the judges of the Eigth Circuit asking them to review a prior decision in the Janis case. The State of Scuth Dakota filed a writ of certiorari from that decision on January 25, 1983. This Court granted it on May 31.

I should advise the Court that there are two contrary holdings by the South Dakota Supreme Court, contrary to the Eigth Circuit's decision and in the face of the Eigth Circuit's decision as to the question presented.

QUESTION: You mean since the Eigth Circuit decision?

MR. MEIERHENRY: Yes, not the last Eigth Circuit decision, the en banc. We requested that the Court meet once again on this issue en banc to reverse a prior decision. In between the prior decision and the

latest affirmance of their prior decision our South Dakota Supreme Court in light of that and in sometimes colorful language has disagreed with the Eigth Circuit.

The question presented is basically whether the opening of the original Cheyenne River Reservation by settlement through the Act of March 29, 1908 diminished the reservation, the original reservation, as to confer criminal jurisdiction over the opened area to the State of South Dakota. The facts underlying this case are relatively brief and simple.

They are that Mr. Bartlett pleaded guilty to attempted rape on the 21st of April, 1979. The crime that he pleaded guilty to took place in Eagle Butte, South Dakota.

Eagle Butte, South Dakota, the State contends is outside or within the diminished area -- I should say outside the reservation in that area that was dimished by the Act of 1908. The property description down to the lot and block is lot 12, block 16 which is required because it is not reserved land.

On the 9th of February, 1982 Mr. Bartlett filed a writ of habeus corpus contesting his conviction. I think it is best to approach this case --

QUESTION: Mr. Attorney General, could I ask you a fact question. Do most of the members of the

tribe live in the land that is under consideration here?

MR. MEIERHENRY: Many of them do for a number of historical reasons perhaps most recently was the building of the dams along the Missouri River, the flooding of certain areas which caused people to move to Eagle Butte.

QUESTION: Is it comingled so that there are a lot of non-Indians that are living there in the same area?

MR. MEIERHENRY: Yes.

QUESTION: Kind of a checkerboard?

MR. MEIERHENRY: It is a checkerboarded area.

QUESTION: Is the seat of the tribal government on the land?

MR. MEIERHENRY: The seat of tribal government is at Eagle Butte, South Dakota which is off the reservation, and this was done for again a number of factual reasons, it being that area of the country where it was the only town of any relative size having a communications center and so forth. There are many reasons why the federal government chose Eagle Butte and, of course, once the federal government chooses it usually the tribal government follows as a center.

If the Court would indulge me for a moment I

would ask for a moment of historical whimsy. Assume for the moment that instead of being here today and we are across the street in December 1908, and Senator Gamble of South Dakota has once again offered a bill to dimish reservations in South Dakota.

Were I a counsel for that committee I might remind the committee as follows: that in 1904 this committee diminshed Gregory County which is found on map 4 of the handout; that in 1906 Senator Gamble once again introduced a bill to diminish Trip County, South Dakota and the facts there this committee sent out to South Dakota Colonel McLaughlin to consult with the Indians. The committee would have probably been reminded tha this Court in Lone Wolf v. Hitchcock had held that Congress need no longer have agreement but could unilaterally diminish a reservation.

With that in mind that is what we did in Gregory County which is found on map 4. The committee probably would have been reminded that the bill being introduced and as usual the committee asking the Commissioner of Indian Affairs for their advice and as usual Senator McLaughlin was sent to consult with the Indians, that this Court dimished Gregory County and in March of 1907 passed a bill which diminished Trip County.

It is now in December of 1907. The Act concerning Standing Rock and Cheyenne River Reservation was introduced, and again if you will remember that we sent Colonel McLaughlin to consult with the Standing Rock Indians and the Indians of the Cheyenne River Reservation that you will recall Senator McLaughlin took a blue pencil in those consultations and drew the boundaries of the reservation. He informed the Indians that they would have two separate dimished reservations, and we passed a bill to that effect.

QUESTION: He was kind of the professional negotiator all through these years, was he not?

MR. MEIERHENRY: He was the agent for the United States govermment, and as the map will show he was the person who went out and consulted with the Indians in Gregory and Trip County which this Court has held diminished in our case here today and eventually in Bennett and Millet Counties which came later.

The historical whimsy that I am attempting to weave so to speak is to show basically that the committee, Senate Committee on Indian Affairs, that discussed these bills was used to this type of operation, the 1908 bill before you today, in 1904, 1907, the case in question we have, 1908, was a continuous process. Of course, as this Court has

indicated in Dakota and Rosebud it is what Congress intended to do by its Act, and in order to find that we have to look at the surrounding circumstances for one thing.

We have to look at the face of the Act which I submit to the Court today is clear in light of your Rosebud decision.

QUESTION: There are different facts are there not?

MR. MEIERHENRY: In this 1908 case?

QUESTION: There is language of cession and agreement in Rosebud.

MR. MEIERHENRY: Rosebud I believe this Court made the transition that is important. The Court said that the 1904 Gregory County Act did have these words of cession, but if you will look at the Trip County Act which is found on map 4 and the Act here today the operative words are "sell" and "dispose", and this Court held in Rosebud that the 04 Act concerning Gregory County and the 07 Act which had the same exact language as we have in the 08 Act was the functional twin, that the recognition of Lone Wolf and the unilateral action came into play.

So in looking at the acts that have already been decided that affect South Dakota, that Act of 04,

07, and the two in 1910 we have the same operative language in four of them, "sell and dispose of a portion of the reservation". One of the bills says "sell and dispose of a portion of the Pine Ridge Reservation." One says Cheyenne River. One says Eagle Butte. One says Rosebud. So that is a similar factor.

Also the school lands issue is a functional twin of these cases. South Dakota being a state that came in in 1889 got Section 16 and Section 36 as school lands, and when a reservation was dimished the Indian tribe had to be paid for this land because the agreement between the State of South Dakota and the federal government was they were to get these two school land sections.

Most of the debate on this bill of 1908 concerned the payment -- or much of it I should say -- concerned the payment by the federal treasury to the state for these school lands. That is similar.

The other thing that is of utmost importance and as the Court pointed out in Rosebud is that the federal government had no duty to pay the state until such time as the reservation is extinguished, and once it is extinguished then there is a requirement to be paid. They felt in all of these acts that were going through this committee at that time that they had a duty

to pay South Dakota because their intent was to disestablish the reservation and extinguish it thereby causing there to be a payment.

The usual language also had to do with what I will term the exchange provision, that being that since the Indian country was being reduced those Indian people who had allotments in the area that was to be diminished had the right and should be consulted of whether they wished to move back onto the closed portion of the reservation. The face of the Act is clear on that portion, and the intent of Congress because in referring to this right to move back it states that they may take an allotment anywhere within the respective reservations thus dimished to which the reservation may belong.

So on the face of the Act especially in light of Rosebud we have the same operative language that this Court has passed upon in three other Acts, to sell and dispose. Also the school lands provision is found that this Court has disposed of in three other cases.

The taking of allotments has been decided in two other Acts. Now one thing that is also important and the committee would have been told it was different would be this. On the face of this Act of 1908 there is a provision that states -- It is a practical provision that leaps into legislation whether it is at the state

level or the federal level.

There must have been a request by the Indian tribe that they be allowed to cut timber until the land was settled until a settler came and actually was on the land. That is found on the face of the Act.

Congress said by using this language that they may cut this timber in a certain area only as long as the lands remain part of the public domain, and this public domain language was found significant in the Seymour case which we believe supports the State's position that the reservation was dimished.

So just as this Court said that the 1904 Gregory County Act was a functional twin -- or the 1907 Trip County Act was a functional twin to the 04 Act we believe that this Act is a functional twin to the Trip County Act and should be treated by this Court in the same way because those that are familiar as this Ccurt is with the legislative process -- We had a whole string as we pointed out in these maps of cases from South Dakota all introduced by Senator Gamble of South Dakota.

In each and every case the correspondent between the City of Washington and the State of South Dakota was McLaughlin. In each case they appended to the Senate Committee his report of what occurred, and that is in the record, of course, here.

Here he makes very clear that he took a blue pencil and as it is pointed out on map 5 he took a blue pencil and he explained to the people out there because they knew after Lone Wolf he no longer had to have an agreement. They told him to consult, and he took that blue pencil and he showed the Indian people out there where there reservation would be.

He told them that this may be the best you can do to save the red area because there are right now people who want to take away the whole thing. There was not an agreement because there did not need to be an agreement, and Congress knew there did not need to be an agreement.

It was a consultation as to what would occur. That is exactly what happened on the next two when Bennett County and other counties were dimished.

So from the legislative process we can see what the legislative intent was, and this Court has found that legislative intent on either side. The other thing that I would like to mention because there is much made in Respondent's brief is what has been the treatment of this area.

As this Court said in Rosebud perhaps the single most salient fact is the assumption of jurisdiction by the state shortly thereafter. South

Dakota had exercised jurisdiction over this area clearly from 1911 until the Eigth Circuit Court of Appeals' decision in 1972.

Since that time there has been controversy. We have had two district judges rule one way. We have had the Eigth Circuit say that it is Indian country. We have had the State Supreme Court say it is not Indian country. It needs to be settled.

But at least from 1911 when the first recorded federal case appears, the LaPlant case, from 1911 to 1972 the State of South Dakota exercised continuous control over that area. It was considered by all parties to be within the state.

The United States Attorney for the District of South Dakota in 1973 in the case that was before the Eigth Circuit filed -- I believe it is one of the amicus briefs -- a clear indication that at least in 1973 the United States of America considered this to be a dimished reservation and not a park.

The most clear way that I can state it is by quoting a brief sentence out of the Stankey v. Waddell case of our Supreme Court, the South Dakota Supreme Court, wherein they said, "This Court assumed jurisdiction over unalloted land within the opened area after LaPlant in 1911 and consistently maintained such

jurisdiction until Condon" -- that being the Eigth Circuit case -- "in 1972."

QUESTION: Of course, the Solicitor General is on the other side of the case now.

MR. MEIERHENRY: He has filed a brief. That is correct. I believe the United States government as it can do can change its mind.

However, in light of Rosebud we think the law should be consistent. It should be clear. There is nothing to show that there was any change of congressional intent between the spring of 1908 and the fall of 1908 or the year 1907.

So for all of those reasons the State of South Dakota would urge this Court that nothing would appear in the legislative history, the surrounding circumstances to indicate any other intent of Congress no matter the rightness of its cause or all the policy arguments of today that anything occurred that would not make this a dimished reservation.

We would ask after 61 years the Eigth Circuit reversed that we go back to the clear understanding of all in South Dakota and the clear intent of Congress in 1908 in dimishing the reservation and leaving it to state jurisdiction.

Thank you.

CHIEF JUSTICE BURGER: Mr. Tobin.

ORAL ARGUMENT OF TOM D. TOBIN, ESQ.,

ON BEHALF OF AMICI CURIAE

MR. TOBIN: Mr. Chief Justice, and may it please the Court:

This Court has decided four cases since 1962 that deal generally with the question presented, Seymour, Mattz, DeCoteau and Rosebud. In terms of the central issue of congressional intent we have an Act of Congress that on its face is to sell and dispose of a portion of an Indian reservation leaving a reservation thus diminished and triggering provisions in the enabling act that talked in terms of reservation extinguishment and a restoration to the public domain which also appears on the fact of the Act.

In the consultations between the tribe and the federal government references were made to new reservation boundaries and the transaction was generally referred to as a cession or sale of land or a relinquishment of a portion of a reservation as similar transactions were referred to and similar negotiations for decades passed. We submit that common sense understanding would lead one to conclude that Congress intended to alter that reservation, and from 1911 until 1973 the decisions of our courts have reflected that

common sense understanding.

Now in terms of county government we did have a serious problem when the Court of Appeals altered the status quo and disregarded this precedent in 1973. Chief Justice Dunn described the jurisdictional confusion that resulted, and in terms of the units of local government most directly affected by a decision such as that difficulty was experienced in the area in terms of administering law and order and performing other ordinary county functions.

In general I think the amicus briefs from other counties and other parts of the country attest that they have experienced similar problems in recent years. We feel that essentially this particular Act, the 1908 Act, fits squarely within the historical perspective of the DeCcteau and Rosebud precedent of this Court from two perspectives.

Number one, those cases should establish a perspective from the late 1800's through the 1900's with respect to the General Allotment Act, specifically Section 5. Secondly, DeCoteau and Rosebud also should establish a perspective that although there were changes in that period in time that those changes were not intended to reflect a change in the intent of Congress.

I think to put the second point in another way

one cannot expect an act in 1894 to be drafted in the same manner to reflect circumstances that did not exist in 1908. Yet, that is essentially the position that the tribe has taken in this particular case that you must look to the 1984 Rosebud Act and never go beyond it to 1907 and 1910.

Yet we are talking about a 1908 act of Congress that is in all substantial respects identical to the two later Rosebud Acts. Secondly, we believe that there is certainly nothing in the DeCoteau or Rosebud documents or the opinions of this Court to reflect that those decisions were intended to be anything other than to reflect a national policy, and the Attorney General's brief filed by the State of Minnesota reflects that concern and 11 other states have joined with Minnesota in those views by lodging letters with the Court.

At the very least DeCoteau and Rosebud represent the rule rather than the exception for South Dakota, and the confusion in this particular case started with the pre-Rosebud, pre-DeCoteau precedent of Condon v. Erickson in 1973. Now we feel that now is the time and this is the case to make clear that such pre-DeCoteau, pre-Rosebud precedent can no longer be blindly adhered to.

When the Court of Appeals decided Condon it did so with express references to stressing the need to find a reservation boundaries on the face of the Act under what it termed the glare of Seymour. This Court in DeCoteau reversed the Court of Appeals for such strict construction of statutory principles.

Subsequent to Rosebud the Court did review the case again, but the limit to the analysis and the two opinions that they did does not reveal that they have actually adopted the approach of this Court in DeCoteau.

QUESTION: Of course, Rosebud itself affirmed the Eigth Circuit.

MR. TOBIN: That is correct. Rosebud did affirm the Eigth Circuit, but at the time the Eigth Circuit decided Rosebud it was subsequent to having been earlier reversed in DeCoteau. Secondly, there was no pre-DeCoteau, pre-Rosebud precedent such as Condon present in the Rosebud case which we feel froze the Eigth Circuit Court of Appeals in 1973 to the position that they were going to take in the Condon decision.

This Court in Puyallup indicated that DeCoteau and Rosebud shed new light upon this issue in general. The two lower district court decisions that by the federal district courts that came out subsequent to

these decisions adopted the manner and the approach of this Court's opinions in Rosebud and DeCoteau and documented them to be the same.

Now we feel that this documentation and that is the central issue here should have led the Court of Appeals to the same conclusion.

In conclusion we ask this Court to reaffirm the holdings and the reasonings of DeCoteau and decide this case in the context of those opinions. We submit that the Court of Appeals should be reversed.

I would like to point out in closing that the location of the tribal agency in this particular case was selected in 1955 when under state and local precedent and federal precedent it was acknowledged to be off the reservation and that the population statistics presented in the briefs before this Court similarly reflect that move. The Missouri River was flooded in the '50's and the people moved to the Eagle Butte area because tribal trust land lied adjacent to that particular town, and over the past 20 years 2000 more people now reside in that area.

The town itself still consists of approximately 400 and some people within the reservation boundaries, and through the 1950's the statistics in that particular county are not unlike those in Trip

County and Millet County or any other area of the State of South Dakota.

If the Court has any further questions I will sit down. Thank you.

CHIEF JUSTICE BURGER: Ms. Locklear.

ORAL ARGUMENT OF ARLINDA LOCKLEAR, ESQ.,

ON BEHALF OF RESPONDENT

MS. LOCKLEAR: Mr. Chief Justice, and may it please the Court:

At the outset I think it is crucial for this Court's inquiry in this case to examine three points, three statements, and in some cases serious misstatements that have been made by Mr. Meierhenry in his presentation for the State. First of all, let's look at the demographics of this area. The open portion of the Cheyenne River Reservation now has 65 percent almost 66 percent of the enrolled members of the Cheyenne River Tribe now residing there.

Overall the total population of the open area is roughly one-half Indian. Now there is absolutely no basis in fact or in the record for the Petitioner's suggestion here that those statistics are a result of a current demographic move on the part of the Cheyenne River people as a result of flooding on the western part of the reservation.

I refer the Court to Professor Hoxie's conclusion which is a part of this record that at the time the proclamation was issued which opened this area in 1909 55 percent of the tribal allotees were located in the opened area, and the opened area which is now the subject of this law suit. That is a significant figure because one of the variations of the allotment act and the opening act of Cheyenne River over the general allotment scheme was that each member of the tribe was to receive their own allotment so that when 55 percent of tribal allotments were located in the opened area that is a good indication of what the population of the area was at the time as well.

I would also point out to the Court that the Congressman from South Dakota who was responsible for the support and sponsoring and enactment of the Rosebad Acts which the Petitioners find so persuasive here was also the Commissioner of Indian Affairs in the early 1920's. In that capacity Congressman Burke wrote, and we have quoted in our brief excerpts from this letter, that he agreed that the recommendation made originally in 1912 that the BIA offices which now service the tribe should be moved to Eagle Butte, should be done, that that move should be implemented.

This correspondence takes place some time in

the early 1920's which indicates and the letter says explicitly that Eagle Butte is in the center of the reservation. Now that is the view mind you of Congressman Burke who later sponsored and was responsible for the enactment of the very 1907 and 1910 Rosebud Acts which the State finds so persuasive here.

That we think is a strong indication that Congressman Burke unlike the State now knows the difference between the 1907 and 1910 Rosebud Acts and this very situation. Now the second inquiry we need to examine are those statutes.

Let's look at the similarities in the language between the 1907, the 1910 Rosebud statutes and this statute. Let's take Mr. Meierhenry's hypothetical committee one year back further.

He suggested that as a committee they might have examined in 1907 its precedent in Rosebud and referred to that in adopting the 1908 Cheyenne River statute. That very same hypothetical committee would have had before it one year before in 1906 consideration of an Act with precisely the same operative language which applied to the Coleville reservation in the State of Washington.

This Court had occasion to construe that language in Seymore v. Superintendent and did not find

that language the language authorizing the Secretary of the Interior to sell and dispose of surplus and unalloted lands to have the purpose of disestablishment. Obviously the language itself does no prove the clear intent on Congress' part which is required to find an act of disestablishment.

We must look elsewhere in Rosebud. In Rosebud that other evidence is found before the 1907 statute. It is found in he 1904 Act and it is found in the 1901 and 1903 agreements, cession agreements, using typical cession language between the Rosebud tribe and the United States.

Those two agreements were explicitly set out in their very terms in the 1904 statute, and this Court in its analysis of the three Rosebud Acts explicitly said as well that the language and the circumstances of the 1904 statute were crucial to its inquiry in that case. The preexisting disestablishment language agreements and the codification of that purpose in the 1904 Act establish a base line purpose and a continuing purpose of disestablishment which was simply carried forward in the later 1907 and 1910 Acts.

The fact then that the 1907 and 1910 Acts used language different from the 1904 Act was really viewed as fairly insignificant by this Court in its Rosebud

decision. Its analysis centered primarily on the 1904 Act and its adoption and explicit ratification of the 1901 and 1903 agreements having disestablishment language.

Because we do not have that base line purpose of disestablishment in a preexisting cession agreement in this case the sell and dispose language which we find in 1908 could have easily have been presumed by Mr. Meierhenry's hypothetical committee to mean the same thing that that committee thought it meant in 1906 and which is what this Court construed it to mean later in its Seymour v. Superintendent decision. That is a purpose to open the lands only but not to alter the reservation boundaries.

A third point that is significant and where we take sharp difference with the State on is the so-called history of uncontested jurisdiction of the state court over the opened area. Now let's examine that. The State asserts without any reference to any authority because there is none that it has exercised jurisdiction over the opened areas for 60 years without contest by the tribe and the federal government.

That is simply not true. The most salient evidence of the untruthfulness of that fact is that there is no a single state prosecution of an Indian in

state court before the early 1960's. 1963 is the first recorded state prosecution of an Indian of a crime alleged having occurred on the opened portion of the Cheyenne River Reservation.

QUESTION: Were prosecutions regularly being conducted in the federal court for criminal offenses or what?

MS. LOCKLEAR: The record that we have in this cases suggests that they were, Your Honor. If you refer to cur brief we cite two instances where the federal court did prosecute members of the tribe for crimes that occurred on the opened portion of the reservation after 1908.

The State has simply chosen to ignore at least that evidence of belief on the part of the federal ccurt that it did indeed have jurisdiction. It reflects a brief on the part of not only the prosecutor but the Court that the federal court at the time had jurisdiction over the area.

The only two cases that the State does cite are prosecutions of a non-Indian, and this Court is well aware that when there is a competing claim of authority or jurisdiction in Indian country between the tribe, the state and the federal government that where non-Indians are involved the state's interest is always given

greater weight.

QUESTION: Ms. Locklear, your client in this case pleaded guilty, did he not?

MS. LOCKLEAR: Yes, Your Honor. That is true.

QUESTION: Why does that not waive all antecedent jurisdictional defects?

MS. LOCKLEAR: Your Honor, at the time that the plea was entered and at the time this petition for writ of habeus corpus was filed our client was unrepresented by counsel. It was not until the case with the Eigth Circuit Court of Appeals that counsel was appointed to represent Mr. Bartlett.

It is not at all clear how and under what circumstances plea bargaining was arranged so I cannot speak factually to the issue of waiver, but I would point out as well that jurisdictional defects have traditionally been viewed as nonwaivable by the courts. I think that that is what we are talking about here. We are talking about a disabling defect in the state court jurisdiction which could not be waived under any circumstances.

Now once those three points are examined you get some idea of what the State's case is like here. The State's case is built on assertions for which there

is no evidence to support them in the record and built on mischaracterizations of exactly what happened in the instance of the 1908 statute on Cheyenne River.

With he remainder of my time I would like to divide my comments between the two general principles which we think most clearly demonstrate that aside from these mischaracterizations the 1908 Act itself did not have the purpose of disestablishing the opened area of the Cheyenne River Reservation.

First, the federal Indian policy which prevailed at the time in 1908 was based on the General Allotment Act also known as the Dawes Act of 1887. This Court construed that statute in its decision in 1973 in Mattz v. Arnett.

As explained by this Court the Dawes Act simply provided for the division of tribal lands among tribal members as an allotment and the sale of surplus or leftover tribal lands to non-Indian homesteaders. It was thought at the time this Court explained that by dividing tribal property in that manner the Congress could encourage tribal Indians to abandon tribal ways and adopt White ways.

It was thought that eventually that process would lead to the natural demise of all Indian reservations, but significantly this Court held in Mattz

v. Arnett that the General Allotment Act itself did not have that purpose. The General Allotment Act did not provide for or require and was not inconsistent with continued reservation status of all Indian reservations.

QUESTION: Do you think that was correct?

MS. LOCKLEAR: Yes, Your Honor. We think that was absolutely correct, and we think that that theme was also carried forward as this Court observed in Mattz v. Arnett in the special opening acts. The Dawes Act itself was discretionary and did not compel that any particular Indian reservation be opened.

Congress from time to time as a result passed special opening acts which required that a particular reservation be opened pursuant to that general policy and oftentimes made some variations for that general policy in light of the particular circumstances of that reservation.

In its Mattz opinion the Court construed such a general opening act. The Act before it in that case was the 1892 Clamoth River Act which applied to the Clamoth River Reservation in California.

It also had the same language that the hypothetical committee in 1906 had before it in the Coleville statute, that is, the operative language

directed the Secretary of the Interior to sell and dispose of surplus unallotted lands on the reservation. This Court described that statute as simply one of a number of typical opening acts which did not differ materially from the purpose and the effect of the Dawes Act and did not have the effect of altering the reservation boundaries in that case.

This Court in the Mattz opinion in construing that statute also referred to the 1908 Cheyenne River Act that is at issue in this case. In footnote 19 of its opinion the Court after having described the Clamoth River statute as but typical of the numerous opening statutes of the period listed a number of other statutes.

That list included among others the 1908 Cheyenne River Act. The Court also noted the Cheyenne River statute had been construed by the Eigth Circuit as not having affected reservation boundaries.

This Court's suppcsition in Mattz v. Arnett that the 1908 statute did not have the effect of altering the reservation boundaries is borne out by a closer examination of the terms of the 1908 statute itself. First of all, the statute generally did not more than what the Dawes Act authorized generally across the nation.

The Dawes Act applied as I noted to all Indian reservations and had been applied specifically to open Indian reservations in states as varied as Washington, Idaho, Montana, North Dakota and others including South Dakota. The Cheyenne River Act was simply a specialized application of that general Dawes Act policy.

It provided as well for the division of tribal lands among tribal members and non-Indian homesteaders. Significantly, it varied the general Dawes Act scheme in some particulars that we should note.

First of all, it provided for the reservation of certain tribal property interests in the opened area itself. Sufficient property interest for Indian agency, school and religious purposes were explicitly reserved in the Cheyenne River Act.

In addition, the Act also reserved all mineral lands located in the opened area that were to be held in trust for the tribe. The Act did not in its terms alter the reservation boundaries.

The Act in its terms did not terminate the opened area. The Act did not suggest that state court jurisdiction would be extended to the opened area. In fact, the Act did not even allude to state court jurisdiction over the area.

Also importantly given the position that the

Petitioners have taken the Act did not employ the cession language which has typically been found by this Court to support a finding of disestablishment. The primary terms of the 1908 statute then show nothing more than the typical opening act which this Court construed in both Mattz v. Arnett and Seymour v. Superintendent as having left the reservation boundaries intact.

Now the State as a result of that seizes upon language which appears elsewhere in the statute and tries to construct in effect a new statute based on phraseology and provisos which appear in later provisions of the statute. The first of those that the State refers to is the language where in Section 2 the final proviso of Section 2 Congress contrasted Indian allotments retained in the opened portion of the reservation with those allotments located on that part of the reservation "thus dimished".

That is the language that the State lifts out of the closing proviso out of Section 2 as the key to construing the entire statute. Even in that instance, however, the State is simply wrong.

There is no evidence on the basis of the record that we have that Congress intended by the use of that term to mean anything other than reduced or dimished common tribal land ownership, not reduced

reservation boundaries. The Eigth Circuit in its opinion and which this Court cited favorably in Mattz v. Arnett distinctly noted that the context of that phrase "thus diminished" suggests that that is exactly what the phrase meant and no more.

In addition, the legislative history of the statute which is set out at length by the State in the appendix to their brief indicates that the Congress in its reports on the 1908 statute used that phrase "diminished" to refer as well to the reduced or diminished common land base of the tribe, not jurisdiction.

In addition, I would refer the Court to the subsequent treatment of the 1908 statute which indicates that that phrase was commonly used by the Department of the Interior in its records after the passage of the Act to refer to precisely that, the area of the reservation whre the tribe held diminished or reduced tribal lands. Specifically and I think which is the most telling example comes from an exhibit which appears as attached to Professor Hoxie's report. It is an excerpt from the 1911 annual report of the Superintendent of the Cheyenne River Indian Reservation, 1911, after the passage of the Act.

Referring to tribal court and tribal police

jurisdiction over the reservation the Superintendent says, "The police are expected to cover the entire reservation both the diminished portion and the portion thrown open to settlement."

QUESTION: Have the tribal police been exerting jurisdiction over this entire open area since the Act was passed?

MS. LOCKLEAR: Yes, indeed they have since before the passage of the Act. The history of tribal court jurisdiction and the history of tribal police authority over the reservation long precede and anti-dates the passage of the 1908 statute.

That is another aspect of the State's so-called long-term reliance of jurisdiction that is simply inaccurate. They wholly overlook the continued assertion of tribal authority over that area.

QUESTION: Are there any hunting and fishing rights of the state in the open area?

MS. LOCKLEAR: Not that appear on this record, Justice O'Connor. The only -- In fact this record this record suggests that the only interests at stake in this case are interests of tribal members.

If you will refer to the 1937 codification of the tribal laws which is quoted in our brief you will see that the tribe in 1937 codified its practice of

asserting jurisdiction over only tribal members. That is explicitly stated in its 1937 code.

That appears to have been its practice before 1937. Professor Hoxie's report on this issue is clear, and I might add unrefuted by the State that both the tribal court and the tribal police exercise authority over the entire area after 1908.

It becomes clearer if you understand that the Cheyenne River Reservation was at the time both before and after the passage of the Act divided administratively for purposes of both tribal government and the Bureau of Indian Affairs into four administrative districts.

One of those districts, the Thunder Butte, was located wholly within the opened portion of the reservation. Professor Hoxie notes, and again this stands unrefuted by the State, that the subagency at Thunder Butte after 1908 had an operating tribal court which exercised jurisdiction in criminal matters over its own members under the explicit report and authority of the Department of the Interior.

We think that that record which again was carried forward and codified in 1937 which, of course, was approved explicitly by the Department of the Interior shows a strong understanding on both the tribe

and the Department that the 1908 Act did not have the effect of altering the reservation boundaries.

As a result the thus diminished language referred to and relied on so heavily by the State in this case can mean no more than what this Court quoted in its Mattz v. Arnett opinion out of the Clamoth River situation. In the Clamoth River Act the Court noted that the statute itself referred to "was the Clamoth River Indian Reservation".

Now because that phrase in that statute could be read either one of two ways this Court concluded that that phrase could not support a finding of clear intent on Congress's part to disestablish the reservation. The phrase "thus diminished" in this context must be similarly construed.

It as well cannot support a finding of clear intent to disestablish the Cheyenne River Reservation. Now there are as the State has noted surrounding circumstances that must also be examined to construe any particular opening statute.

In this instance there are two such surrounding circumstances which we think are particularly telling. First, is the absence of an agreement, a cession agreement, with the Cheyenne River Sioux Tribe.

There were as the State points out some meetings between a government official and the Cheyenne Tribe for the purpose of explaining the provisions of the 1908 statute. There was, however, no meeting held or no negotiation sponsored with the governing body of the Cheyenne River Tribe.

No agreement was proposed. No agreement was signed. You had nothing more than a small group of tribal members who could be assembled on short notice attending a hurried meeting with a government official for the limited purpose of explaining the Act.

Now let's pause for a moment here and examine what the State characterizes as the nature of those discussions. The State would have us believe that those discussions clearly demonstrated to the tribe that their reservation boundaries would be diminished, altered, reduced. That is not the case at all.

Those discussions demonstrated only that the tribe's common land base would be diminished, reduced. First of all, the magic blue line which the Petiticners find so important as to that construction of the meeting did not take place at all at Cheyenne River.

The blue line and the map on which it was drawn appeared only at the meeting that took place several days before with the Standing Rock Tribe.

Howver, even if you examine the significance of that blue line and of the map that was produced at that meeting you will see that they do not again even in that context support the construction that the Petitioners would have this Court reach.

We must understand that what we have here is a government agent explaining in a the DeCoteau, a language to which the concept of a lands sale is wholly alien -- You have a government explaining in that language the provision of exactly that, a land sale. Now to illustrate to the tribe exactly which lands were going to be sold, which lands were going to be retained, the government agent took out a map and he drew a line and he said these lands will be yours and these lands will be open to settlement.

There is no indication that the government agent did more than that, that the government agent meant more than that or that the Standing Rock or the Cheyenne River people in attendance understood any more than that. Viewed in that context the reference by that government agent to diminished land means the same thing that that phrase means in the proviso that appears in Section 2 of the Act.

It means nothing more than this will be from henceforth your reduced land base. There was no

discussion at all of jurisdictional consequences.

Understood in that context the blue line, the map, the appearance of a particular government agent has no significance at all. Now I might add that the particular government agent which the Court is encouraged to find persuasive here is really an incidental if relevant factor at all.

The particular government agent as we pointed out in our brief had been an agent for some number of years and had traveled in that capacity to a number cf Indian reservations including those in South Dakota. That same agent also visited the Coleville Reservation in Washington which this Court found not to have been disestablished.

There is absolutely no evidence that Congress gave this particular inspector carte blanche to carry with him the kiss of disestablishment to every reservation that he visited. South Dakota in that respect is not unique any more than South Dakota is not unique in repsect of the opening language or with respect to the disestablishment language.

Those factors will not support finding of disestablishment here. They were referred to again by this Court in Rosebud, but only up against the context of the clear language of disestablishment found earlier

in the 1904 statute.

QUESTION: See, counsel, a long time ago maybe 100 years or so when I was on the Court of Appeals I wrote an opinion that seems to carry overtones that favor the other side of the case from yours. That I think was United States ex rel Minor.

The Attorney General throws it at me, but I do not believe you cite it in your brief. Do you have any comment on that case?

MS. LOCKLEAR: Your Honor, we think that the Eigth Circuit has considered that view, reconsidered the view in light of the dissent, your dissent in particular, and in light of this Court's later opinions on this very issue and decided to adhere to its original position that the Cheyenne River Reservation was not disestablished by the 1908 Act. We think --

QUESTION: But it was Judge Lay that dissented.

MS. LOCKLEAR: Yes, Your Honor. That is true, but we nonetheless think that the Court's majority opinion in its reconsideration en banc of that issue gives Your Honor sufficient grounds to find that the 1908 statute is different and is not governed by the other principles that the Petitioner --

QUESTION: So you think I can get out from

under that --

MS. LOCKLEAR: Yes, we do. We would encourage you to try.

(Laughter)

MS. LOCKLEAR: The second salient and we think compelling factor in this case that --

QUESTION: Just to keep clear I did not say it completely supported the other side. I said it had overtones.

MS. LOCKLEAR: Yes, Your Honor. That is true.

The second circumstance that we think is relevant here and would support a determination by this Court that the opened lands have not been disestablished has already been alluded to, and that is the consistent and unrefuted assertion of tribal authority in this area after 1908. Essentially what we have got here is a question that concerns tribal Indians themselves.

We have an assertion in this very case of state authority to prosecute for crimes that occurred with in a reservation an Indian where the complaining witness in the case is also an Indian. The State's interest in such cases has been acknowledged by this Court to be minimal admittedly.

If we succeed in this litigation then the State will lose a very limited part of its jurisdiction

now. It will lose only its ability to prosecute cases such as these.

On the other hand, if we lose this case the tribal court will lose the authority it has been exercising since well before 1908 and the authority which has gone unchallenged by the State until the early 1960's to exercise its own jurisdiction in this area.

QUESTION: Ms. Locklear, can I ask you one question before your time runs out. At the very outset of your argument you referred to a letter by Congressman -- later Head of the Indian Affairs -- Burke I believe it was about the location of the Indian office in which he said that would be within the reservation, something to that effect.

MS. LOCKLEAR: Yes.

QUESTION: Can you tell us where that is in the record?

MS. LOCKLEAR: Yes. It is cited in the Hoxie report. It appears at page 95 of the Hoxie report itself and it is also cited in our brief at pages 35 and 36.

QUESTION: Thank you.

MS. LOCKLEAR: Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Attorney

General? You have four minutes remaining.

ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. MEIERHENRY: Just briefly, Your Honor.

Counsel in here zeal perhaps made the statement that the State of South Dakota by making the statement that we have exercised jurisdiction since 1911 I believe her words said it is just not true. Well, in that regard I will refer the Court to 612 Federal Reporter where the Eigth Circuit Court of Appeals said as follows: basically that we have exercised jurisdiction.

My goodness, why would we have had hearings in all these cases had we not been exercising jurisdiction.

QUESTION: Has the federal court likewise been exercising jurisdiction and has the tribal court also been exercising jurisdiction?

MR. MEIERHENRY: In any checkerboard jurisdiction of course this occurs because with the reservation being diminished if it occurs on an Indian allotment and it is a felony the United States of America takes it before the grand jury processes. If it is a misdemeanor the tribal court has jurisdiction.

That is what my ccunsel opponent is talking

about. Yes, the tribe has exercised jurisdiction on the Indian allotment land, the checkerboarding that the State has never claimed we have jurisdiction on. The dotted line if I can use it as that of the diminished reservation leaves the checkerboarding which we have handled in South Dakota and other states --

QUESTION: I understood I thought Ms. Locklear to say that the tribal court and indeed the federal court had also exercised jurisdiction over crimes on open lands.

MR. MEIERHENRY: She may have stated that. What I am referring to in 612 Federal Reporter is that is not the case. The United States Attorney for South Dakcta testified under oath -- and he was a U.S. Attorney for 29 years from 1940 to 1969 -- that the State had exercised jurisdiction and also the State's Attorney for Dewey County, the area considered the State had exercised.

I did not think today that there would be a statement that it is not true that the State has exercised jurisdiction for 61 years. The record is it clearly has.

So what I am stating is the federal government and I as a defense lawyer when I started practicing had cases Indian defendant, Indian victim in this area in

state court. There is a 1925 appellate case.

So that is the only reason I have risen in rebuttal is to point out that that is not an issue. We have to remember that even if it is diminished we have this tri-party level of state, federal, tribal on alloted lands which are miniature reservations.

We do not intend nor do we assert jurisdiction over trust land off the reservation any more than I assume California exercises jurisdiction over the Persidia which is a federal reservation.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:29 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1253-HERMAN S. COLEM, WARDEN, AND MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, Petitioners v. JOHN BARTLETT

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pirre Hammond

(REPORTER)