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The Puyallup Indians and the Reservation Disestablishment Test

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THE PUYALLUP INDIANS AND THE RESERVATION DISESTABLISHMENT TEST

It was early recognized that Congress has the authority unilaterally to disestablish all or any part of an Indian reservation.[1] The mere opening of a reservation for settlement by non-Indians does not by itself demonstrate a congressional intent to terminate the reservation status of the land.[2] The circumstances surrounding the opening, however, may evidence such an intent.[3] Therefore, when Congress opens a reservation for settlement by non-Indians without expressly stating the intended effect on the reservation status of the land, it is unclear whether Congress has exercised its disestablishment power. It is such an absence of congressional direction that makes the existence of the Puyallup Indian Reservation uncertain.

The determination of whether the territory retains its reservation status is important because it establishes which laws govern the land.[4] Traditionally, federal and tribal laws govern the area inside reservations, and state laws govern the area outside them.[5] Thus, a finding

1. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The proposition that Congress can unilaterally disestablish an Indian reservation was recently reaffirmed in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

2. Seymour v. Superintendent, 368 U.S. 351 (1962). *See* notes 35–39 and accompanying text *infra*.

3. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). *See* notes 52–59 and accompanying text *infra*.

4. The determination of reservation status does not affect the ownership of the land. The Puyallup Indian Reservation was allotted in 1872 and federal government patents were issued in 1886. *See* note 18 and accompanying text *infra*. The present owners of the land hold title by virtue of these patents. *See* Ross v. Eells, 56 F. 855 (C.C.D. Wash. 1893). The validity of these patents has never been disputed.

5. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (the state has no jurisdiction within an Indian reservation).

The significance of the reservation boundary as a limit on state jurisdiction over criminal offenses and civil causes of action between Indians was diminished for some reservations in 1953 by the passage of Public Law 280, Act of August 15, 1953, Pub. L. No. 83–280, 67 Stat. 588 (codified in part as amended at 18 U.S.C. § 1162 (1976), 28 U.S.C. § 1360 (1976)), which gave five states (California, Minnesota, Nebraska, Oregon, and Wisconsin) general criminal and civil jurisdiction over Indian reservations within their boundaries. Congress also gave its consent for "any other state . . . to assume jurisdiction" over the reservations within its boundaries by the passage of "affirmative legislative action." *Id.* § 7. Public Law 280 was amended in 1968 with the passage of the Indian Civil Rights Act, which made tribal consent a requisite for any future assumption of jurisdiction by the states. Indian Civil Rights Act of 1968, Pub. L. No. 90–284, § 401, 82 Stat. 73 (codified at 25 U.S.C. § 1321 (1976)).

Under the authority granted in Public Law 280, Washington has assumed partial civil and criminal jurisdiction over the Puyallup Indian Reservation, as well as over the other

that land retains its reservation status will affect a tribe's ability to tax,[6] zone,[7] and manage its internal affairs.[8] In the case of the Puyallup Indian Reservation, a finding that the reservation continues to exist would mean that approximately one-fifth of the city of Tacoma, Washington, is within the reservation[9] and therefore subject to federal and tribal jurisdiction. This could have a significant impact upon the city's tax base, comprehensive zoning plan, and bonding capacity.[10]

This comment considers whether the Puyallup Indian Reservation was disestablished when it was opened near the turn of the century for settlement by non-Indians. Although the Ninth Circuit Court of Appeals has held that "the Puyallup Indian Reservation continues to exist,"[11] subsequent dictum of the United States Supreme Court casts doubt upon the continuing validity of this holding.[12] The question of

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Indian reservations within its borders. WASH. REV. CODE ch. 37.12 (1976). However, the reservation status of the land will still have a significant impact on disputes involving encumbrances of land and interference with treaty rights. *See generally* Canby, *Civil Jurisdiction and the Indian Reservations,* 1973 UTAH L. REV. 206, 211.

6. *See, e.g.,* McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) (state cannot tax income earned by a tribe member from reservation sources); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) (tribe can tax a tribe member); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) (tribe can tax a non-Indian on the reservation); Confederated Tribes of the Colville Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978) (tribal cigarette tax preempted state tax as applied to sales by Indians on a reservation).

7. *See, e.g.,* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977) (county is without jurisdiction to enforce its zoning ordinance or building code on Indian reservation trust lands). *See also* Comment, *Jurisdiction to Zone Indian Reservations,* 53 WASH. L. REV. 677 (1978).

8. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 (1978) (tribe has civil jurisdiction over Indians and non-Indians on the reservation); Williams v. Lee, 358 U.S. 217, 220 (1959) (recognized the Indians' right to "make their own laws and be ruled by them"); Jones v. Meecham, 175 U.S. 1 (1899) (tribal law governs inheritance of reservation land); Duckhead v. Anderson, 87 Wn. 2d 649, 555 P.2d 1334 (1976) (tribal law determines child custody of a tribe member on the reservation).

9. Brief of Respondent, exhibit on unnumbered page, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977) (map of the city of Tacoma showing the reservation boundaries).

10. Telephone Interview with William Barker, Assistant City Attorney for the City of Tacoma, Washington (Oct. 16, 1978).

11. United States v. Washington, 496 F.2d 620, 621 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974). The Ninth Circuit Court of Appeals vacated and remanded an unpublished district court decision which held that the Puyallup Indian Reservation had been extinguished. As of this writing, no action has been taken on remand, and final judgment has not been entered.

12. In Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977), the Supreme Court stated:

> The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion. The Ninth Circuit, relying on our decision in *Mattz v. Arnett,* 412 U.S. 481, held that the reservation did still exist, *United States*

the reservation's continued existence has also been raised in recent litigation.[13] After reviewing the Puyallup Indian Reservation's history and analyzing it in the context of Supreme Court decisions concerning disestablishment, this comment concludes that the Puyallup Indian Reservation was not disestablished when it was opened for settlement by non-Indians.

I. THE HISTORY OF THE PUYALLUP INDIAN RESERVATION

In 1854 the Puyallup Indian Reservation was reserved for the exclusive use of the Puyallup Indians by the Treaty of Medicine Creek.[14] Article VI of this treaty provides that the President may, at his discretion, allot the reservation and issue patents to individual Indians.[15]

Soon after the reservation was established, Congress was pressured to open it for settlement by non-Indians.[16] Congress authorized a survey of the reservation in 1872,[17] and in 1886 President Cleveland issued patents on the land[18] under authority of the Treaty of Medicine Creek and a subsequent act of Congress.[19] These patents, however, were not alienable by the Indian allottees,[20] and pressure to open the

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v. Washington, 496 F.2d 620 (1974), cert. denied, 419 U.S. 1032. That decision predates our consideration of *DeCoteau v. District County Court,* 420 U.S. 425, and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977).

Id. at 173 n.11. The dissent in *Puyallup Tribe* sharply criticized the majority for failing to recognize the holding of United States v. Washington. *Id.* at 183 (Brennan and Marshall, JJ., dissenting).

13. *See* City of Tacoma v. Andrus, No. 77-1423 (D.D.C. Jan. 20, 1978), *reported in* 5 INDIAN L. RPTR. F-37 (1978).

14. Treaty with the Nisqually and Other Indian Tribes, Dec. 26, 1854, 10 Stat. 1132 (Treaty of Medicine Creek). After the reservation was created, its boundaries were twice altered by executive order. 1 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 919, 922-23 (2d ed. 1904).

15. 10 Stat. at 1133.

16. The Puyallup Reservation is located on the shores of Commencement Bay in Puget Sound. Commencement Bay is the only salt water access to the city of Tacoma. When Tacoma was designated as the western terminus of the Northern Pacific Railroad in 1873, the land along the bay became very valuable. *See* United States v. Ashton, 170 F. 509, 515 (C.C.W.D. Wash. 1909); AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY 53 (1970).

17. Act of May 29, 1872, ch. 233, 17 Stat. 165, 186.

18. A total of 166 patents covering approximately 17,463 acres were issued. S. EXEC. DOC. No. 34, 52d Cong., 1st Sess. 11-12 (1891), *reprinted in part in* Ross v. Eells, 56 F. 855, 856 (C.C.D. Wash. 1893).

19. Act of July 4, 1884, ch. 180, 23 Stat. 76, 88-89.

20. Article VI of the Treaty of Medicine Creek incorporates by reference the allot-

reservation continued to mount. In 1890 Congress established a commission to study the "wisdom and necessity of the disposal by the Indians of their interests."[21] In the following year, the commission reported that the reservation was a "serious detriment to the City of Tacoma," and recommended that as much of it as possible be sold "without injustice to the Indians."[22]

In response to these recommendations, Congress passed an act in 1893 (the "Puyallup Act") establishing a commission to determine which portions of the allotted lands on the Puyallup Indian Reservation were not required for the homes of the Indian allottees.[23] In addition, the Puyallup Act authorized the sale of the lands not needed for Indian homes to non-Indians, on condition that no allotted land would be sold without the written consent of the Indian allottees. Lands not selected for sale were to be inalienable for ten years. In 1904 Congress affirmed the expiration of this inalienability period by consenting to the sale of the remaining allotted lands.[24]

Under the authority of the Puyallup Act, most of the land on the reservation was put on the open market for sale.[25] By 1904 the tribal holdings on the reservation had dwindled from 18,000 acres to approximately thirty-six acres.[26] Soon after the opening of the reservation, the State of Washington began exercising jurisdiction over the land.[27] Today, a major portion of the Port of Tacoma industrial district is located within reservation boundaries. A recent estimate indi-

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ment provisions of the Treaty with the Omahas. 10 Stat. at 1133. The Omaha treaty provides that patents may be issued by the President "conditioned that the tract shall not be aliened [sic] or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture . . . ." Treaty with the Omahas, March 16, 1854, 10 Stat. 1043, 1044-45. The individual patents that were issued on the Puyallup Indian Reservation also incorporated the restrictions in the treaty with the Omahas. A copy of one of these patents is printed in Ross v. Eells, 56 F. 855, 857 (C.C.D. Wash. 1893).

21. Act of August 19, 1890, ch. 807, 26 Stat. 336, 354.

22. S. EXEC. Doc. No. 34, 52d Cong., 1st Sess. 16 (1891).

23. Act of March 3, 1893, ch. 209, 27 Stat. 612, 633-34.

24. Act of April 28, 1904, ch. 1816, 33 Stat. 565.

25. Brief for Appellant at 7, United States v. Washington, 496 F.2d 620 (9th Cir. 1974). By Act of June 7, 1897, the 1893 Commission was reduced to one member whose duty was to ascertain the rightful holders of the allotments and to supervise the sale of the land. Act of June 7, 1897, ch. 3, 30 Stat. 62, 87. The land was neither homesteaded nor sold as a large unit, but was subject to individual sales. It has been reported that between 1898 and 1914 the Puyallup Indian Commissioner executed 1,420 conveyances of reservation land. T. Giere, Redman in a Gray Area: The Puyallup Indians 11 (Spring, 1971) (unpublished report in University of Washington Law School Library).

26. Brief of Respondent at 35, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977).

27. *See* State v. Smokalem, 37 Wash. 91, 79 P. 603 (1905) (state exercised jurisdiction over a criminal offense committed by an Indian on the reservation).

cates a total Indian population within the reservation of 636, as compared to a non-Indian population of 26,666.[28] The Puyallup tribe has retained exclusive use of about twenty-two acres of the original reservation.[29]

II. THE RESERVATION DISESTABLISHMENT TEST

The Puyallup Indian Reservation was opened for settlement pursuant to a general congressional policy designed to assimilate the Indians into the mainstream of American society.[30] This policy was most clearly expressed by the General Allotment Act of 1887,[31] which established a scheme of allotment of Indian reservations similar to that which occurred on the Puyallup Indian Reservation[32] and declared the Indian allottees citizens of the United States. Because the General Allotment Act, like the Puyallup Act, did not expressly disestablish Indian reservations, the Supreme Court has had several opportunities to address the question of reservation disestablishment in a context similar to that of the Puyallup Indian Reservation.

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28. Brief of Respondent at 33, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977) (estimate by the State of Washington using 1970 census data).

29. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 174 (1977). In addition to tribal holdings, two or three hundred acres of the original reservation are held by individual Indians. AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 16, at 54.

30. Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 142–44 (1977).

31. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–381 (1976)). The General Allotment Act was an attempt to settle the Indians into homesteads, acquaint them with the practice of farming, and induce non-Indians to move onto the reservation. The land allotted to the Indians was held in trust for a period of twenty-five years, and it was thought that during that period the Indians would gradually adopt the white ways. Therefore, when the trust period expired, the reservation could be abolished without injustice to the Indians. Mattz v. Arnett, 412 U.S. 481, 496 (1973). *See generally* Wilkinson & Biggs, *supra* note 30.

The assimilation policy was unsuccessful and was eventually abandoned with the passage of the Indian Reorganization Act of 1934. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–492 (1976)). The Indian Reorganization Act discontinued the issuance of allotments, extended indefinitely the trust period on allotted lands still held in trust, and restored tribal ownership to the unallotted lands which had not been settled.

32. The allotment scheme established by the General Allotment Act differed from the procedure followed on the Puyallup Reservation in several respects. First, the General Allotment Act provided for a 25-year trust period rather than the 10-year period of inalienability established by the Puyallup Act. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388. Second, negotiations under the General Allotment Act were conducted directly with the tribe rather than with individual Indians. *Id.* Third, the General Allotment Act provided for sales of only unallotted or surplus land, while the Puyallup Act provided for sales of allotted land. *Id.*

A. The Supreme Court Decisions

The Supreme Court first addressed the question of the status of an Indian reservation in *United States v. Celestine*.[33] In *Celestine,* the state attempted to assert jurisdiction over a crime committed by an Indian against an Indian victim on allotted land within the Tulalip Indian Reservation. The Court rejected the state's claim that the issuance of a government patent on the land changed its status, stating that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."[34]

The *Celestine* holding was expanded in *Seymour v. Superintendent*.[35] *Seymour* involved the Colville Indian Reservation, which had been declared "open to settlement and entry" by a 1906 act of Congress.[36] In that case, the state presented two arguments to justify its assertion of jurisdiction over a crime committed by an Indian on reservation land owned by a non-Indian. First, the state argued that by opening the reservation for settlement by non-Indians, Congress had terminated the reservation, thus allowing the exercise of state jurisdiction over the former reservation. The Court rejected this argument because it found no language in the 1906 act "expressly vacating" the reservation.[37] Second, the state argued that even if the entire reservation had not been disestablished when it was opened for settlement, the reservation status of the alienated land had been terminated when it was sold to non-Indians. This argument was also rejected because a gradual diminution of the reservation would result in an "impractical pattern of checkerboard jurisdiction" which could not have been intended by Congress.[38] The Court buttressed its conclu-

33. 215 U.S. 278 (1909).

34. *Id.* at 285.

35. 368 U.S. 351 (1962).

36. Act of March 22, 1906, ch. 1126, § 4, 34 Stat. 80, 81.

37. The Court compared the language of the 1906 act declaring the reservation "open to settlement and entry," *id.*, with the language in an 1892 act which had disestablished the north half of the Colville Reservation by declaring it "vacated and restored to public domain." Act of July 1, 1892, ch. 140, 27 Stat. 62, 63. Unlike the first act, the 1906 act lacked express language sufficient to disestablish the reservation. 368 U.S. at 354–55.

38. 368 U.S. at 358. If the state's contention had been sustained, reservation status and tribal jurisdiction on the land would have been terminated as each parcel was sold. A law enforcement officer would therefore have to carry a deed book to determine on which portions of the land he had jurisdiction. Naturally, the deed book would have to be routinely supplemented because jurisdiction would be constantly changing. The Court concluded that Congress could not have intended such an impractical result. *Id.*

sion that the reservation had not been disestablished by noting that the Department of the Interior had continued to recognize the reservation status of the land after the passage of the 1906 act.[39]

The question of reservation disestablishment again faced the Court in *Mattz v. Arnett*.[40] In that case, the state attempted to enforce its fishing regulations against Indians fishing within the Klamath River Indian Reservation in California. Because the language of the 1892 act opening the reservation for settlement had referred to the reservation in the past tense,[41] the state argued that Congress had expressed an intent to disestablish it.[42] The Court refused to infer an intent to terminate the reservation from the mere use of the past tense in the settlement act and established the principle that a "congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[43] As in *Seymour,* the Court buttressed its conclusion by noting that both the Department of the Interior and Congress had continued to recognize the reservation.[44]

The first case in which the Supreme Court found a clear congressional intent to disestablish in the absence of words expressly terminating a reservation was *DeCoteau v. District County Court*.[45] In this case the federal government had negotiated an agreement with the Sisseton-Wahpeton Tribe in which the Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest" in all the unallotted lands on the Lake Traverse Indian Reservation in South Dakota in exchange for a "sum certain" sale price.[46] Congress ratified this agreement and opened the reservation for settlement.[47]

Although the Court recognized that ambiguities in congressional language are to be resolved in favor of the Indians,[48] it found that the

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39. *Id.* at 357.

40. 412 U.S. 481 (1973).

41. Act of June 17, 1892, ch. 120, 27 Stat. 52. See note 64 *infra* for an excerpt of the language of the act.

42. As further evidence of congressional intent, the state pointed to language in previous drafts of the act which, if enacted, would have expressly terminated the reservation. The Court found the failure to enact more explicit legislation to be evidence of congressional intent not to terminate the reservation. 412 U.S. at 503–04.

43. *Id.* at 505.

44. *Id.*

45. 420 U.S. 425 (1975).

46. Act of March 3, 1891, ch. 543, § 26, 26 Stat. 989, 1036.

47. *Id.* § 20, 26 Stat. at 1029.

48. 420 U.S. at 444, 447. The rule that ambiguities are to be construed in favor of

language "cede, surrender, grant and convey" clearly indicated that Congress intended to terminate the reservation status of the ceded land.[49] The Court reinforced its conclusion by noting that the Commissioner of Indian Affairs had ceased to recognize the reservation status of the ceded land.[50]

The *DeCoteau* Court distinguished *Mattz* and *Seymour* on the grounds that those cases did not involve a bilateral agreement and a sum certain sale price.[51] This distinction was subsequently tested in *Rosebud Sioux Tribe v. Kneip*.[52] In *Rosebud,* Congress had, by separate legislative acts, made three purchases of large tracts of the Rosebud Indian Reservation in South Dakota. Although the first two purchases were preceded by negotiations with the tribe, no binding agreement was obtained.[53] The third purchase was made without ne-

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the Indians is a canon of construction applicable to interpreting all legislation affecting the Indians. *See, e.g.,* McClanahan v. State Tax Comm'n. 411 U.S. 164, 174 (1973) (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith"); United States v. Nice, 241 U.S. 591, 599 (1916) ("According to a familiar rule, legislation affecting the Indians is to be construed in their interest"). This rule of construction was affirmed in its application to reservation disestablishment by Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586–88 (1977).

49. A majority of the Court found the language of cession in the 1891 act to be "precisely suited" to reservation disestablishment. 420 U.S. at 445. Three justices dissented on the ground that the 1891 act did not contain "a word to suggest that the boundaries of the reservation were altered." *Id.* at 461 (Douglas, Brennan & Marshall, JJ., dissenting).

50. The Court noted that the maps published by the Commissioner of Indian Affairs after 1908 labeled the ceded area as an "open" or "former" reservation. *Id.* at 442.

51. *Id.* at 447–49.

52. 430 U.S. 584 (1977).

53. Article 12 of the treaty with the Rosebud Sioux Tribe provided that no cession of any part of the reservation would be valid without the written approval of three-fourths of the adult male Indians on the reservation. Treaty with the Sioux Indians, art. 12, April 29, 1868, 15 Stat. 635. The United States began negotiations for the purchase of part of the reservation near the turn of the century, and in 1901, by written agreement, three-fourths of the adult male Indians agreed to "cede, surrender, grant, and convey" a particularly described portion of the reservation in exchange for a sum certain sale price of $2.50 per acre. 430 U.S. at 591 n.8 (reprinting the operative language of the agreement). Instead of ratifying this agreement, Congress altered the terms of payment and returned it to the Indians for their approval.

An amended agreement was obtained which lacked the signatures of the required three-fourths majority. Nevertheless, Congress ratified this agreement, incorporating the cession language verbatim and opening the Gregory County portion of the Rosebud Indian Reservation for settlement in 1904. Act of April 23, 1904, ch. 1484, 33 Stat. 254.

A second portion of the reservation was purchased and opened for settlement in 1907. Act of March 2, 1907, ch. 2536, 34 Stat. 1230. This purchase also followed negoti-

gotiations with the tribe.[54] Only the language of the act authorizing the first purchase incorporated words of cession,[55] and the act authorizing the third purchase did not even set a sale price.[56]

The Rosebud Tribe argued that the disestablishment of an Indian reservation required a clear congressional intent, and that in the absence of express language such intent could be inferred only when there was a bilateral agreement and a sum certain sale price. Rejecting the tribe's argument, the Court found the required intent in the cession language of the first act, and concluded that the subsequent acts were passed with a similar intent.[57] Thus, it was held that the reservation status of the land in all three parcels had been terminated. This conclusion was further supported on the grounds that the President had interpreted the acts as diminishing the reservation,[58] and that the state had assumed "unquestioned jurisdiction" over the land since the passage of the acts.[59]

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ations with the tribe which culminated in an agreement signed by fewer than the requisite three-fourths majority.

54. The third purchase occurred in 1910. Act of May 30, 1910, ch. 260, 36 Stat. 448. Instead of negotiating an agreement with the tribe, Congress relied upon a report from the Indian agent which stated that tribal sentiment for opening the third portion of the reservation was "practically unanimous." 430 U.S. at 610.

55. The 1904 act stated, "The said Indians . . . for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota." Act of April 23, 1904, ch. 1484, 33 Stat. 254, 254. In contrast, the 1907 and 1910 acts only provided "[t]hat the land shall be disposed of . . . under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President." Act of March 2, 1907, ch. 2536, § 2, 34 Stat. 1230, 1230; Act of May 30, 1910, ch. 260, § 2, 36 Stat. 448, 449. The operative language of these latter purchases is very similar to that examined by the Court in *Seymour*. *See* text accompanying notes 35 & 36 *supra*.

56. Instead of establishing a sum certain sale price, the 1910 act provided that the consideration for the sale would be "fixed by appraisement." Act of May 30, 1910, ch. 260, § 4, 36 Stat. 448, 450.

57. 430 U.S. at 606.

58. The Court quoted part of a presidential proclamation which it interpreted as "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment." *Id.* at 602–03.

59. *Id.* at 598 n.20, 603–04. Three justices dissented in *Rosebud* on the grounds that the cession language in the 1904 act was ambiguous under the circumstances of that sale and therefore should be construed in favor of the Indians. Furthermore, the dissent noted that there was no cession language in the 1907 and 1910 acts, thereby refuting the majority's contention that those acts evidenced a clear congressional intent to disestablish. *Id.* at 615 (Marshall, Brennan, & Stewart, JJ., dissenting). *See* notes 42 & 43 and accompanying text *supra* (discussion of the test requiring a clear congressional intent).

B. *The Current Statement of the Disestablishment Test*

The foregoing cases indicate that the controlling determination in a disestablishment inquiry is congressional intent. Congressional intent to disestablish must be expressly stated on the face of a statute or be clear from the legislative history and circumstances surrounding the passage of the act. As evidence of congressional intent, the Court will consider the operative language of the statute, the legislative history of the act, subsequent agency and congressional recognition of the reservation, and the practical effects of disestablishment. Therefore, a determination whether the Puyallup Indian Reservation exists must be made in light of these considerations.

III. APPLICATION OF THE DISESTABLISHMENT TEST TO THE PUYALLUP INDIAN RESERVATION

A. *Operative Language*

When the central purpose of a statute is to disestablish an Indian reservation, Congress will state that purpose expressly in the operative language of the act.[60] Therefore, when congressional legislation fails expressly to address the disestablishment issue, either that issue was not the central purpose of the statute, or it failed to command majority support in Congress. In either case, any inference of a congressional intent to disestablish is weak.

The Puyallup Act contains no language expressly terminating the reservation,[61] and therefore a presumption against disestablishment is raised.[62] However, as stated in *DeCoteau,* this presumption is rebutted by language of cession by which the Indians relinquish and convey their interest in the land.[63] There is no language of cession in the Puy-

60. Congress has terminated reservations in the past by the use of express words such as "discontinued," Act of July 27, 1868, ch. 248, 15 Stat. 198, 221, "vacated and restored to public domain," Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 63, and "abolished," Act of April 21, 1904, ch. 1402, 33 Stat. 189, 218. *See also Mattz,* 412 U.S. at 504 n.22.

61. *See* note 64 *infra* (quoting the Puyallap Act).

62. In *Mattz,* the absence of express language of termination was considered evidence of a congressional intent not to terminate. *See* note 42 *supra.*

63. *See* notes 45–49 and accompanying text *supra.* In contrast to language of cession, language of declaration (language by which Congress merely declares a reservation to be open for settlement and entry) is not sufficient to disestablish a reservation. *See* notes 36–37 and accompanying text *supra.*

allup Act. Instead, the Act merely provides for the sale of the land on the reservation for the benefit of the Indian allottees. This language opens the reservation for settlement, but is not sufficient to rebut the presumption against an intent to disestablish.[64]

Another significant aspect of the operative language of the Puyallup Act is that it expressly provides that a portion of the reservation is to be retained by the Indians and not opened for settlement.[65] Therefore, if the Act's language expresses an intent to disestablish, it does so in reference to only a part and not to all of the reservation. Other statutes which have been construed as disestablishing a part of a reservation have always contained an exact description of the portion of the land which is to lose its reservation status.[66] The operative lan-

64. The Puyallup Act provides:

> That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission . . . to select and appraise such portions of the allotted lands as are not required for homes for the Indian alotees [sic] . . . . And if the Secretary of the Interior shall approve the selections and appraisements made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees.

Act of March 3, 1893, ch. 209, 27 Stat. 612, 633. This language is similar to that used in the act authorizing the sale of the Klamath River Reservation: "That all the lands embraced in what was Klamath River Reservation . . . are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands . . . ." Act of June 17, 1892, ch. 120, 27 Stat. 52, 52. The Klamath River Reservation was held not to be disestablished in *Mattz*.

Compare the language of the 1904 act which was held in *Rosebud* to terminate part of the Rosebud Indian Reservation:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: [description of the ceded land].

Act of April 23, 1904, ch. 1484, 33 Stat. 254, 254.

65. The Puyallup Act expressly provides that "the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years . . . ." Act of March 3, 1893, ch. 209, 27 Stat. 612, 633.

66. Where the entire reservation is to be disestablished, Congress will not provide a legal description since the boundaries are already well established. See, for example, the language of the agreement with the Sisseton-Wahpeton Tribe which was incorporated by reference into the 1891 act disestablishing the Lake Traverse Reservation in South Dakota. That agreement states: "The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation. . . ." Act of March 3, 1891, ch. 543, § 26, 26 Stat. 989, 1036. Where only a part of the reservation is to be disestablished, Congress normally provides an exact description of the ceded land. *See, e.g.*, Act of April 23, 1904, ch. 1484, 33 Stat. 254, 254 (part of the

guage of the Puyallup Act contains no such description,[67] suggesting that Congress did not intend to disestablish the reservation status of the land sold under its provisions.

B. Legislative History

The Supreme Court cases have highlighted two familiar patterns in the legislative history of settlement acts which provide evidence of a congressional intent to disestablish. The first pattern is exemplified by *Mattz* and consists of a series of legislative attempts to disestablish a reservation followed by the passage of an act which merely opens the reservation for settlement. This "clear retreat" from previous attempts to vacate the reservation is evidence that Congress did not intend to disestablish the reservation.[68] The second pattern is exemplified by the bilateral agreement of *DeCoteau*. Although a binding agreement is not essential to finding congressional intent to disestablish, when such an agreement exists it indicates "an unmistakable baseline purpose of disestablishment."[69]

The legislative history of the Puyallup Act does not fall into either pattern. It does, however, offer some evidence of congressional intent by negative implication. Every statute construed by the Supreme Court as terminating reservation status which does not contain express language of disestablishment either has been preceded by negotiations with the tribe or has been part of a series of purchases initially preceded by negotiations with the tribe.[70] The sale of the Puyallup In-

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language of this act is reproduced in note 64 *supra*); Act of March 2, 1907, ch. 2536, § 2, 34 Stat. 1230, 1230; Act of May 30, 1910, ch. 260, § 2, 36 Stat. 448, 448–49.

67. The portion of the Puyallup Indian Reservation to be sold is not described either by location or amount. See note 64 *supra* for an excerpt from the Puyallup Act. The Act authorizes the appointment of a commission to determine which part of the reservation could be sold. Thus, to construe the Act as an exercise of the congressional power to disestablish the reservation would be to find an unprecedented delegation of that power. It is highly unlikely that Congress intended such a delegation.

68. *Rosebud*, 430 U.S. at 598–99 n.20 (quoting *DeCoteau*, 420 U.S. at 448).

69. *Rosebud*, 430 U.S. at 592.

70. It is probably the existence of negotiations and not varying congressional intent which is most responsible for the differences in operative language of the various settlement acts. When the settlement act has been preceded by an agreement with the Indians, the cession language of the initial agreement has been incorporated into the act. *See Rosebud*, 430 U.S. at 597. The use of this language may have been no more than a simple expedient, or possibly a justification for what would have occurred anyway.

In all cases, the congressional intent was probably the same. The reservations had become obstacles in the path of manifest destiny. Congress thought it necessary to open the

dian Reservation was not preceded by negotiations with the tribe. The Puyallup Act required only the consent of individual Indian allottees before their land was sold.[71] Therefore, the absence of both a bilateral agreement and negotiations with the tribe is, by negative implication, evidence that Congress did not intend to disestablish the Puyallup Indian Reservation.[72]

C. Subsequent Congressional and Agency Recognition

The Supreme Court has consistently looked to congressional and federal agency recognition of a reservation after its opening as evidence of congressional intent in the settlement act.[73] When Congress or the Department of Interior continues to recognize reservation status, the Court is more likely to infer a congressional intent to retain the reservation. Several congressional and agency documents have recognized the existence of the Puyallup Indian Reservation since the passage of the Puyallup Act.[74] These documents provide evidence that Congress did not intend to disestablish the reservation.

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reservations and therefore adopted a policy of assimilating the Indians into the mainstream of American society. *See* notes 30–31 and accompanying text *supra*. The pressures for opening the various reservations were so recurrent that the Court has dubbed them "familiar forces." *Rosebud*, 430 U.S. at 590 (quoting *DeCoteau*, 420 U.S. at 431).

It is therefore more reasonable to attribute the differences in operative language to the existence of an agreement with the Indians than to a difference in congressional intent. The *Rosebud* Court implicitly recognized this when it held that the congressional intent in all three acts disestablishing parts of the Rosebud Reservation was the same although the operative language and circumstances surrounding these three acts were quite different. *See* notes 53–59 and accompanying text *supra*.

71. Act of March 3, 1893, ch. 209, 27 Stat. 612, 633–34, *See also* note 25 and accompanying text *supra*.

72. Although the sale of the reservation was preceded by the Treaty of Medicine Creek, any argument that would substitute that treaty for the bilateral agreement of *DeCoteau* or the negotiations of *Rosebud* must fail because the treaty, while providing for the allotment of the reservation, does not provide for the sale of the allotted lands to non-Indians. *See* note 15 and accompanying text *supra*.

73. *See* notes 39, 44, 50, 58, & 59 and accompanying text *supra*.

74. *See, e.g.*, H.R. REP. No. 2503, 82d Cong., 2d Sess., 52, 550, 560, 933–34, 1092, 1286, 1306–07 (1952); Office of the Regional Solicitor, Portland, Ore., Dep't of Interior, Memorandum Opinion (August 13, 1971) (copy on file with *Washington Law Review*); Constitution and Bylaws of the Puyallup Tribe of the Puyallup Reservation of the State of Washington (April 11, 1936) (as amended) (approved by Harold L. Ickes, Secretary of the Interior, May 13, 1936) (copy on file wih *Washington Law Review*).

After considering the evidence of congressional and agency recognition of the Puyallup Indian Reservation, the Ninth Circuit stated:

> Nor can we discern a significant variance between the historical background, including the continuing congressional and agency recognition, of the Klamath River

Nevertheless, in several cases the State of Washington has argued that while Congress has made repeated statutory references to the Puyallup Tribe, no such references have been made to the Puyallup Indian Reservation.[75] This argument overlooks substantial evidence of congressional and agency recognition, but even if this evidence were not available, the state's argument would not provide an adequate basis to conclude that Congress intended to disestablish the reservation. To find such an intent, the Court has relied only upon affirmative acts, such as designation of the land as a "former reservation" on the Bureau of Indian Affairs maps, or declarations by the President that the reservation had been terminated.[76] Instead of relying upon affirmative acts, the state relies only upon congressional inaction to support its argument. At most, this lack of congressional action indicates that the reservation status of the land has remained unchanged since the opening of the reservation.

The State of Washington has also argued that any ambiguity in the history of the congressional and agency recognition of the Puyallup Indian Reservation is clarified by the absence of a federal challenge to the state's exercise of jurisdiction on the reservation.[77] This position was supported by the *Rosebud* Court when it stated that the state's exercise of "unquestioned jurisdiction" is evidence of a congressional intent to disestablish.[78] However, this criterion cannot, by itself, support an inference of a congressional intent to disestablish since it is capable of multiple meanings. For example, it may only indicate that the Bureau of Indian Affairs was without the manpower to exercise jurisdiction over the reservation or that Congress was unaware of the state's exercise of jurisdiction. Furthermore, the state's exercise of jurisdiction on the Puyallup Indian Reservation did face a serious federal challenge in 1974,[79] and therefore has not gone "unquestioned."

Reservation [which was held not to be disestablished] involved in *Mattz* and the historical background and continuing recognition of the questioned Puyallup Reservation. For that matter, the historical background and continuing congressional and agency recognition of the Puyallups would appear to be substantially more impressive than that of the Klamaths.

United States v. Washington, 496 F.2d 620, 620–21 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974).

75. Brief of Respondent at 38–41, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); Petition for Writ of Certiorari at 13–14, United States v. Washington, 496 F.2d 620 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974).

76. *See* notes 50 & 58 and accompanying text *supra.*

77. Brief of Respondent at 32, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); Petition for Writ of Certiorari at 6, United States v. Washington, 496 F.2d 620 (9th Cir.), *cert. denied,* 419 U.S. 1032 (1974).

78. 430 U.S. at 598 n.20, 603–04.

79. United States v. Washington, 496 F.2d 620 (9th Cir.), *cert. denied,* 419 U.S.

D. Practical Effect of Termination

The final criterion to be examined by the Court as evidence of congressional intent to disestablish is the practical effect of termination. In examining such effects, the Court will not weigh the merits of retaining the reservation in light of modern circumstances, but instead will consider only the practical consequences which reflect the congressional intent at the time the reservation was opened for settlement.[80] The most significant practical effect of disestablishment which the Court will consider is the termination of reservation boundaries—the jurisdictional line between the tribe and the state. If the Puyallup Act is construed as disestablishing the reservation, the termination of the reservation status must have occurred as the land was sold, because the Puyallup Act, while expressly preserving part of the reservation, does not describe what land was to lose reservation status.[81] Such a termination would create an "impractical pattern of checkerboard jurisdiction" which would change every time a piece of land was sold to a non-Indian. This result was condemned in *Seymour*.[82]

The amount of the reservation that would be disestablished by a statute will also be considered by the Court when determining if Congress intended to disestablish a reservation. When a reservation is merely diminished rather than completely destroyed, the Court is more likely to infer a congressional intent to disestablish.[83] Construing the Puyallup Act as disestablishing the reservation would result in a virtual extinguishment of the reservation, since by 1904 the tribal holdings on the reservation had been reduced to only about thirty-six

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1032 (1974).

80. The Court's deferral to congressional judgment on the relative merits of retaining an Indian reservation is proper because the power to disestablish Indian reservations lies with Congress and not the Court. *See* note 1 and accompanying text *supra*.

A close analogy to the Puyallup situation can be seen in Seymour v. Superintendent, 368 U.S. 351 (1962). In that case, the state attempted to assert jurisdiction over a crime committed by an Indian in the town of Omak, Washington. Rather than consider the modern consequences to the town of Omak, the Court focused on the practical effect of disestablishment at the time the reservation was opened. Under the Court's reasoning, it would have made no difference if today the town were owned entirely by non-Indians, because at the time the land was being sold there would have been an impractical pattern of jurisdiction which Congress could never have intended. *Id.* at 358–59. The reasoning in *Seymour* is consistent with the subsequent Supreme Court cases on reservation disestablishment, since none of the latter cases has examined the modern consequences of the reservation status.

81. *See* notes 66 & 67 and accompanying text *supra*.

82. *See* note 38 *supra*.

83. *Rosebud*, 430 U.S. at 598–99 n.20.

acres.[84] Therefore, a higher burden of proof will be required before the Court will infer a congressional intent to disestablish the Puyallup Indian Reservation.

IV. CONCLUSION

The Puyallup Indian Reservation was opened for settlement by non-Indians but was never expressly disestablished. Under such circumstances, a court must look at the congressional intent of the settlement act to determine whether Congress intended to terminate the reservation. Congressional intent is determined by examining the operative language of the act, the legislative history of the act, subsequent congressional and agency recognition of the reservation, and the practical effect of termination.

The principal arguments in favor of inferring termination of the Puyallup Indian Reservation are based upon the state's exercise of jurisdiction on the reservation since its opening[85] and upon the potential hardships imposed upon the city of Tacoma by the existence of a reservation.[86] Although these arguments express valid concerns, they do not reflect Congress' intent when it passed the Puyallup Act in 1893 and should not be used by a court as a basis for determining that the reservation was disestablished. The problems posed are not without a remedy because Congress can, if necessary, expressly disestablish the Puyallup Indian Reservation and provide compensation for its taking now.

The operative language and the circumstances surrounding the passage of the Puyallup Act provide little or no evidence of a congressional intent to disestablish the reservation. Therefore, a challenge of the reservation's status can, at best, show that the congressional intent of the Puyallup Act is ambiguous. In such a case, ambiguity should be construed in favor of the Indians.

Richard M. Slagle

84. Brief of Respondent at 35, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977).

85. *See* note 77 and accompanying text *supra*.

86. *See* note 10 and accompanying text *supra*.