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By James A. Lake, Sr.*

Standing Bear! Who?

On February 29, 1980, a Native American was enshrined in the Nebraska Hall of Fame—the first of his race to be thus honored.¹ Although he joined a very select group,² Standing Bear, a Ponca Chief known to his tribesmen as *Ma-chu-nah-zha*, is not well known to Nebraskans. Indeed most non-Indians and probably more than a few Native Americans know nothing about Chief Standing Bear and the chain of events responsible for placing him in the Hall of Fame. Because it was a courtroom scene involving the law, a thoughtful judge, and the oratorical skills of lawyers and of Standing Bear himself that gave the Ponca Chief a place in history and gave the Native American recognition under the law, it is appropriate to recount that event in a periodical serving the legal profession.

The saga of Standing Bear may not be isolated from the evolution of federal Indian law in general, because the epic which will be recounted occurred during a time when the policy substructure of federal Indian law was under intense reexamination. In fact, Standing Bear's quest to remain a free man provides a springboard for discussing a part of the historical development of federal Indian policy. Thus the modest aim of this article is, first, to set forth

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1. The Nebraska Legislature created the Nebraska Hall of Fame in 1961. The law created a commission with power to select persons for the Hall of Fame and to superintend the commemoration of those chosen. The method of commemoration is a bust of the honoree displayed in the State Capitol.

The purpose, stated in the law, is to bring public attention and recognition to outstanding "Nebraskans." Nebraskans are persons who were born in Nebraska, who gained prominence while living in Nebraska, or whose Nebraska residence was an important influence upon their lives and contributed to their greatness. See NEB. REV. STAT. §§ 72-724 to -729.01 (Reissue 1976); NEBRASKA BLUE BOOK 535-36 (1976-77).

2. The other honorees are: George W. Norris, Willa Cather, John J. Pershing, Edward J. Flanagan, William F. Cody, William J. Bryan, Bess Streeter Aldrich, John G. Neihardt, and J. Sterling Morton. In addition to the above, Grace Abbott, Roscoe Pound and Mari Sandoz were elected during the Nation's Bicentennial Year (1976). See L.B. 670, 1976 Neb. Laws 353. All Nebraska Congressional Medal of Honor winners from the Civil War to date are members by virtue of L.B. 1212, 1969 Neb. Laws 2448.

the story of Chief Standing Bear and, second, to highlight some basic themes which may be found in federal Indian law.

Standing Bear's life cannot be separated from the fortunes and misfortunes of his tribe, the Ponca. Hundreds of years ago—a more exact date is difficult to establish—the Ponca, Omaha, Osage, Kansa, and Quapaw Tribes were one people. This truth rests not upon a written record, but upon a solid foundation of oral tradition common to each tribe. In turn, these five tribes were part of a much larger native group, commonly called Siouan, which at one time occupied an immense area east of the Mississippi, maybe as far eastward as the Atlantic Ocean. These people moved freely about the United States prior to the appearance of the white men, and on the eve of Columbus' discovery of the new world, many Siouan subgroups were migrating generally westward.³

The five named tribes remained together longer than others in the Siouan group. The first split came when the Omahas and the Quapaws apparently separated sometime prior to 1500, near where the Ohio River empties into the Mississippi. After the separation, the Omahas and Poncas went up the Mississippi, while the Quapaws went downriver.⁴ According to tradition, the Omahas and Poncas followed the Des Moines River to its headwaters and then wandered northeast. Sioux traditions tell of meeting the Omaha near the Blue Earth and Minnesota Rivers.

Rituals, ceremonies, and relics confirm that the Omaha Tribe inhabited a forested area before moving to the Missouri River area. When this move occurred, the Arikara Tribe lived on the west bank of the Missouri River in the area later included in Nebraska; Ponca and Omaha traditions state that the two tribes were still one group when they drove the Arikara northward. Sometime after this the Ponca separated from the Omaha. However, details of the separation are very vague in the traditions of both tribes. Afterwards, the

3. See 1 A. FLETCHER & F. LA FLESCH, *THE OMAHA TRIBE* 34-35 (1972).

4. Oral tradition contains two versions of the separation. One relates that the Omahas safely crossed the river in boats, but a storm blew the Quapaws downstream. The other is that the crossing was made by people clinging to a grape vine rope that broke after the Omahas were across, leaving the Quapaws behind. The Quapaws, misjudging which direction the Omahas would travel, went downstream on the near side, while the Omahas went upstream on the far side. The word "Omaha," comes from the Indian word, "umoⁿhoⁿ," meaning "against the current" (thus, upstream); the word "Quapaw" comes from the Indian word, "uga'xpa," meaning "with the current" (thus, downstream). 1 A. FLETCHER & F. LA FLESCH, *supra* note 3, at 36. See E. Stabler, *Omaha Language Workbook 3* (1980) (unpublished); M. SWETLAND, *UMOⁿHONⁿYE OF ELIZABETH STABLER, A VOCABULARY OF THE OMAHA LANGUAGE* 129, 142 (Nebraska Indian Press, Winnebago, Neb., 1977). On the general migration of the Siouan people westward, see P. RADIN, *THE WINNEBAGO TRIBE* (1970).

Poncas occupied an area near the confluence of the Niobrara and Missouri Rivers.⁵

After the Ponca-Omaha separation and before the purchase of Louisiana by the United States, the Poncas were visited by first Spanish and then French traders. On September 5, 1804, the Lewis and Clark Expedition dispatched two men to visit a Ponca village located close to the mouth of the Niobrara, but they found no "Poncarar" (the term for the Poncas used in the Expedition journal) because the tribe was off on the fall hunt.⁶

Compared to the Sioux or even the Omaha, the Ponca Tribe was never large. For example, an 1829 census reported about 600 Poncas,⁷ and, in fact, between 1800 and 1900 they probably never numbered more than 800. Factors affecting the tribe's size were noted as early as 1830 when the famous traveler and artist, George Catlin, visited the tribe and painted portraits of some Ponca leaders and their wives. Catlin reported a tale of woe related to him by one of the chiefs he painted—Shoo-de-ga-cha, or Smoke. Shoo-de-ga-cha attributed the poverty and distress of his tribe to the depletion of the game supply by white encroachment and to hostile Sioux, Pawnee, Osage, and Konza attacks upon Ponca hunting parties, which were forced to push farther afield for dwindling game. The Chief also estimated that whiskey and smallpox had already destroyed four-fifths of his people.⁸

5. See 1 A. FLETCHER & F. LA FLESCHE, *supra* note 3, at 41, 78-81; J. OLSON, HISTORY OF NEBRASKA 25-26 (1955); O. LAFARGE, PICTORIAL HISTORY OF THE AMERICAN INDIANS 87 (1957). The separation date has been placed as early as 1390 and as late as the middle of the eighteenth century. The Ponca appear on a map dated 1701, and by 1789 they definitely were living on lands where the Niobrara flows into the Missouri. The word "Ponca" is old, but its meaning is not known.

6. See 1 HISTORY OF THE EXPEDITION UNDER THE COMMAND OF LEWIS AND CLARK 108-09 (E. Coues ed. 1893, Dover Pub. ed. 1965); H. JACKSON, CENTURY OF DISHONOR 186 (1881). Evidently the Poncas could have hunted successfully at home, because the two expedition visitors killed a buffalo in the deserted Ponca village. The expedition estimated the Ponca to number only 50 men, the tribe having been decimated by smallpox and by warfare with the Sioux. An expedition map of the journey located the Poncas between the Poncarar River (now Ponca Creek) and the Quicourri River (now the Niobrara River) and listed the size as "200 Souls." Another map, prepared by Capt. Meriwether Lewis and based on information supplied by "best informed travelers," located the Poncas north of the forks of the Platte River in what is now western Nebraska. Undoubtedly this was part of their hunting grounds and the "travellers" could have found them there searching for buffalo and other game. 2 HISTORY OF THE EXPEDITION UNDER THE COMMAND OF LEWIS AND CLARK, *supra*, inside back cover. The same map noted the size as "50 men and 100 tents." *Id.*

7. See H. JACKSON, *supra*, at 186.

8. *Id.* at 186-89. Smoke (or "Smoker," as one treaty listed him) signed the first two Ponca treaties (1817 and 1825). The reddish rock from which the Indians

Until 1871 relationships between the United States and Indian tribes were formalized in treaties.⁹ Before treaty-making ceased, the United States made four treaties with the Poncas. The first two treaties (1817 and 1825) are unimportant for purposes of this account, for, in summary, they established peace between the United States and the tribe, regulated trade with the tribe (largely through federally licensed traders), and provided procedures for redressing wrongs done to persons or property by the other side. Neither of these treaties dealt with Ponca lands.

The third treaty (1858) is the most important for this story because it ceded a large tract of Ponca land to the United States while reserving an area for the tribe to occupy. The treaty ceded to the United States:

[a]ll the lands now owned or claimed by them, wherever situate, except the tract bounded as follows, viz: Beginning at a point on the Neobrara River and running due north, so as to intersect the Ponca River twenty-five miles from its mouth; thence from said point of intersection, up and along the Ponca River, twenty ____ miles; thence due south to the Neobrara River; and thence down and along said river to the place of beginning¹⁰

fashioned the calumet, or pipe, is named catlinite after George Catlin. The material is found only in southwestern Minnesota (now Pipestone, Minn.). The extent of traditional Ponca hunting grounds may be gauged by the tribe's allegations in a twentieth century Ponca suit against the United States. The tribe claimed hunting rights to 25,810,000 acres of land in Nebraska and South Dakota. The same land was claimed by the Sioux, Arapahoe, Cheyenne, Yankton, and other tribes. This Ponca claim was dismissed for lack of prosecution on January 6, 1936. 82 Ct. Cl. 697. See 2 E. SMITH, INDIAN TRIBAL CLAIMS 171 (n.d.).

9. Indian treaty-making ceased abruptly in 1871 when the House of Representatives refused to consider appropriations for treaty implementation until it gained a voice in Indian affairs equal to the Senate. The Senate capitulated, and Indian treaty-making ended. See *Antoine v. Washington*, 420 U.S. 194, 201-02 (1975); 25 U.S.C. § 71 (1976); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 66-67 (Univ. of N.M. ed. 1971); D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 67-68 (1979).
10. Treaty with the Poncas, 1858, art. 1, 12 Stat. 997 (1859); 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 772 (1904). The area reserved in this treaty for the Poncas was outside the boundaries of the State of Nebraska, if the northern boundary of Nebraska described in the 1864 Enabling Act is used. The Enabling Act boundary of Nebraska started at the intersection of 27° west longitude and 43° north latitude (the northwest corner of present day Nebraska) and then proceeded eastward on the 43° north latitude line to where it met the Keya Paha River, then down its middle to the Niobrara River, then down the Niobrara River to its juncture with the Missouri River, and then along the latter river. See Act of Apr. 19, 1864, ch. 59, § 2, 13 Stat. 47 (1864). However, in 1882 the northern boundary of Nebraska was altered. Act of Mar. 28, 1882, ch. 52, 22 Stat. 35 (1882). The new line followed the 43° latitude parallel eastward until that latitude line struck the Missouri River, and then followed the Missouri the rest of the way. The 1858 Ponca Reservation would have been in the State of Nebraska, judged by the altered northern boundary

The Poncas agreed to move to the reserved area within one year after ratification and thereafter were to occupy the reserve as their "future home."

In return for the Ponca land cession, the United States promised the Poncas annual annuities which were to continue for 30 years (\$12,000 annually for five years, \$10,000 annually for ten years, and \$8,000 annually for fifteen years). The Poncas were to receive \$20,000 during the first year after settling upon the reserved area to be used to build homes, to buy agricultural implements, and to fence the land. The United States was to maintain one or more educational institutions for ten years, provided that the annual expense was not to exceed \$5,000. In addition, a mill to grind grain and one to saw timber were to be furnished along with an interpreter, a miller, a mill engineer, and a farmer. As the Commissioner for Indian Affairs explained in his 1858 Report, the objective was to "colonize and domesticate" the Poncas.¹¹

The Poncas immediately honored the treaty and moved to the reserved area in 1858. In doing so they abandoned their settlements outside the reserve, intending to give up hunting for an agricultural economy. However, this soon reduced them to a state of "desperation and destitution,"¹² for although the Poncas expected that the United States would also perform its promises promptly, the Senate did not act until March 8, 1859, four days short of a year after the treaty was signed. In the interim, the government had to feed the Poncas, or the entire tribe would have starved to death.

From the ratification of the 1858 treaty until the mid-1870s, a conspiracy of human and natural forces seemed determined to totally destroy the tribe. Starvation was a constant threat. The Poncas could not provide enough food by cultivating, hunting, or gathering to guarantee survival. Hunts were cut short by hostile Sioux action. In 1860 the Sioux drove off over half the Poncas' horses. Crops withered and burned in the searing heat of droughts. For three years in a row, locusts destroyed all Ponca crops. Their agent had no food and had no money with which to procure food. In desperation some hungry Poncas visited the Pawnee and Omaha Tribes while those who remained on the reservation lived on wild turnips, cherries, plums, and a few roasting ears from their corn fields.

Despite these conditions the Poncas dutifully kept the peace as

line. All Ponca treaties preceded the admission of both Nebraska (admitted March 1, 1867) and South Dakota (admitted November 2, 1889).

11. REPORT OF COMMISSIONER FOR INDIAN AFFAIRS, S. DOC. NO. 1, 35th Cong., 2d Sess. 354 (1858). See H. JACKSON, *supra* note 6, at 189-90.

12. *Id.* The Poncas' 1858 summer hunt was unproductive, and so were most later hunts.

they had promised. They were hungry and often starving, but even with cattle and sheep belonging to others within their sight they did not steal or plunder. They often saw herds of cattle and wagon loads of other goods (flour, coffee, sugar, tobacco) destined for the Sioux Nation—their western neighbors who had at times attacked them. Still the Poncas never lost hope nor retaliated.¹³

The Poncas also suffered from occasional, unprovoked attacks by whites: a group of soldiers from the Seventh Iowa Cavalry attacked thirteen Poncas while they were returning from the Omaha Tribe, killing three women and a small girl, and destroying all the Poncas' equipment and supplies.¹⁴ The criminal law was unable to provide protection to the Poncas. For example, when two Poncas visiting the Yankton Agency were murdered by a party of Santees, the guilty Santees escaped punishment when a court quashed the indictment, ruling that no federal law made such acts by Indians criminal.¹⁵

In 1865, the last treaty with the Poncas relocated their reservation to the east and south of its earlier location. The tribe gave up most of its 1858 reservation and, in exchange, acquired reservation lands surrounding the mouths of the Niobrara River and Ponca Creek.¹⁶ The treaty stated that the two reasons for this move were

13. For example, their agent reported that he knew "whole families to live for days together on nothing but half-dried corn-stalks" even though the same people were in sight of cattle and sheep owned by white settlers. H. JACKSON, *supra* note 6, at 192. W. WELSH, SIOUX AND PONCA INDIANS, REPORT TO THE MISSIONARY ORGANIZATIONS OF THE PROTESTANT EPISCOPAL CHURCH, AND TO THE SECRETARY OF THE INTERIOR ON INDIAN CIVILIZATION 19 (1870).

14. This attack was colored by frontier feelings toward Indians in general. Section 3 of the Ponca Treaty of 1865 awarded the tribe \$15,080 for this "spoliation." Iowa volunteers found "fun" in attacking other Indian groups. For example, Iowa cavalry volunteers thought it a good "joke" to drop a few howitzer shells into the camp of some friendly Sioux (Oglala) camped at the confluence of the north and south branches of the Platte. See G. HYDE, SPOTTED TAIL'S FOLK 87 (1961). Army regulars were away, engaged in the Civil War.

15. This rule was confirmed by the United States Supreme Court in 1886 when it freed a Brule Sioux, Crow Dog, from a death sentence imposed by the First Judicial District of the Territory of Dakota for murdering his chief, Spotted Tail. *Ex parte* Crow Dog, 109 U.S. 556 (1883). Public dissatisfaction with Crow Dog's escaping punishment caused enactment of a federal law making serious criminal activity committed by an Indian in Indian country a federal crime. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (1948)). The constitutionality of the Major Crimes Act was sustained in *United States v. Kagama*, 118 U.S. 375 (1886). The Court held the act was within the plenary federal power over Indian affairs.

16. Treaty with the Ponca Indians, 14 Stat. 675 (1867). The Poncas surrendered all of their old reserve west of the line between ranges 10 and 11 W. of the 6th P.M., Kansas and Nebraska Survey. In exchange they received a new reservation described by reference to the same survey, to wit: all of township 31 N., range 7 W.; fractional townships 32 N., ranges 6, 7, 8, 9, and 10 W. and 33 N.,

to return to the Poncas their old burial grounds and to return their traditional agricultural lands. A third motive was to move the Poncas away from attacks from the west. Shortly after moving to the 1858 reservation, the entire tribe had fled down to the Niobrara's mouth to escape Sioux attacks and was induced to return only "with the greatest difficulty." After returning, the Poncas had clustered fearfully around the agency buildings, afraid to go out to farm.¹⁷

A year after the 1865 Ponca treaty was ratified, the United States entered into a treaty with various bands of the Sioux Nation.¹⁸ This treaty, often called the Fort Laramie Treaty, was the culmination of Red Cloud's War against white intrusion into the Sioux hunting grounds on the east flank of the Big Horn Mountains in Wyoming (then part of Dakota Territory). Article 2 of the Laramie Treaty created a huge reservation for the Sioux (roughly all of South Dakota west of the Missouri River), which used the northern boundary of Nebraska as its southern boundary. At this time the Niobrara River was the northern boundary of Nebraska. Thus, all Ponca land reserved in the 1865 treaty which lay north of the Niobrara River (about 96,000 acres—the bulk of the tribe's land) was given to the Sioux!

How did this mistake occur? Although no one knows for sure, it probably resulted from a lapse of memory on the part of the 1868 Laramie Treaty commissioners. The fact that important military men had participated in the Laramie Treaty negotiations (Lieutenant General William Tecumseh Sherman, and Brevet Major Generals Harney, Augur, and Terry) dampened enthusiasm for probing into why land previously reserved for the Ponca was included in the Sioux Reservation. There is no evidence that the Ponca land was extremely valuable or that the Sioux demanded its

ranges 7 and 8 W.; and the parts of township 33 N. and ranges 9 and 10 W. lying south of Ponca Creek. The treaty also gave the Poncas the islands in the Niobrara lying "in front" of the other described lands. See the disposition of "Niobrara Island" in Act of Mar. 2, 1889, ch. 405, § 21, 25 Stat. 896 (1889).

17. H. JACKSON, *supra* note 6, at 191. The 1865 treaty was not ratified until 1867. This delay was very harmful to the Poncas. Uncertainty over ratification hindered permanent improvements (houses, barns, breaking land, etc.) upon the new reservation and delayed the founding and operation of educational institutions provided for in the 1858 treaty. The 1858 promise of educational facilities was limited to ten years. Thus by the time the new treaty was ratified, the educational grant had but one year left. The 1865 treaty also required the Poncas to use their own funds to reimburse persons already on the new reservation lands for improvements. The Poncas did this out of their annuity money. *Id.* at 195-96.
18. Treaty with the Sioux Indians, 15 Stat. 635 (1869). See, e.g., J. OLSON, RED CLOUD AND THE SIOUX PROBLEM 58-82 (1965); D. BROWN, FORT PHIL KEARNY (1962).

inclusion in the Sioux grant. However, it would be unfair to assign complete responsibility for this carelessness to the treaty negotiators. The executive branch submitted the Laramie Treaty to the Senate, and the Senate consented to the treaty without anyone noticing the mistake. Settlement of the Sioux "problem" was of such great importance to peace in the west that it was easy to overlook a prior treaty with a small, peaceful tribe like the Ponca.¹⁹ Whether the mistake was careless or intentional was immaterial, for, in fact, the same land was granted to two different tribes.

The Sioux immediately claimed the Ponca land and found great delight in using self-help to gain possession of the area. The Ponca and Sioux were not wholly friendly prior to the mistake, and the Laramie Treaty gave the Sioux an excuse to raid the Poncas and a legal argument to justify the action. Thus, the federal government, by a mistake of its own making, had placed itself in the middle of warfare between a very powerful and hostile Sioux Tribe and a very weak, but peaceful and loyal, Ponca Tribe. There is ample evidence that between 1872 and 1876 Sioux raiding parties often visited the Ponca lands, destroying crops, driving off livestock, and, occasionally, killing Poncas.²⁰ Brule Sioux usually made up the

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19. Even if the 1865 Ponca Treaty was too "new" (having been ratified in 1867) to be remembered by the United States negotiators, the 1858 Ponca treaty was not new, and *all* of the Ponca Reservation contained in it was north of the Niobrara, and thus within the Great Sioux Reservation. The Commissioner of Indian Affairs put the following in his 1878 Report: "[B]y a blunder in making the Sioux Treaty of 1868 the 96,000 acres belonging to the Poncas were ceded to the Sioux. The negotiators had no right whatever to make the cession." SENATE REPORT ON THE REMOVAL OF THE PONCA INDIANS, S. REP. NO. 670, 46th Cong., 2d Sess. (1880) [hereinafter cited as SENATE REPORT]. An 1880 Senate Select Committee Report stated: "The Committee are [sic] unable to find in the Indian Bureau any reasons for thus including this reservation . . . [the Ponca reserve] within the limits of the new Sioux Reservation." *Id.* The same Report denied that the Sioux made any demand for the inclusion. The Ponca were not notified or consulted. *Id.* Many discussions of the mix-up lead one to believe that *all* Ponca land was given to the Sioux. This would be true if one means the Ponca Reservation established by the 1858 treaty, because all of that land was north of the Niobrara. It would not be true of the Ponca Reservation established by the 1865 treaty, because some of it was south of the Niobrara. The Poncas inhabited the part *north* of the Niobrara and thus occupied land included in the Great Sioux Reservation.
20. See the letters from the Ponca agent to his superiors in Washington in the Appendix to *Hearings of the Senate Select Committee to Examine into the Circumstances Connected with the Removal of the Northern Cheyennes from the Sioux Reservation to the Indian Territory*, accompanying SENATE REPORT, *supra* note 19, at XXI. These letters reported raids on May 3, 1872 (one Ponca killed); May 17, 1873; all through the month of June 1873; March 20 and July 16, 1874; and June 15, 1876 (one Ponca killed). For an eyewitness account of a Sioux raid on the Ponca which was called off when an event portended disaster, see L. STANDING BEAR, MY PEOPLE, THE SIOUX 76 (1928).

raiding parties, but upon one occasion Oglala Sioux were identified as the culprits.

The federal agent requested money to buy arms and ammunition for the Poncas to use for defense, but his request was denied on grounds of lack of funds. The agent then requested soldiers from Fort Randall and at least one company of infantry was dispatched to protect the Poncas. However, it was such a small force that its commander was ordered not to divide his twenty men and thereby risk their annihilation. The agent then requested a loan of thirty old army rifles to arm the Poncas. General Philip Sheridan eventually authorized the loan of twenty Springfields, and the agent thereupon was able to drill ten Poncas in defensive tactics.²¹

By 1873 the Poncas were under constant fear of Sioux attacks and were suffering intensely from food shortages caused by droughts and grasshopper plagues. To add to their woes, a large Missouri River flood tore away large parcels of Ponca land, sweeping away many of the buildings which they had laboriously constructed. Although their agent reported that the tribe was generally making progress, these natural and human adversities caused many Poncas to consider moving away from their reservation on the Niobrara.

There is ample evidence that the Poncas seriously considered returning to join their ancient companions, the Omahas. On November 6, 1873, Ponca and Omaha chiefs met and actually signed an agreement in which the Omahas promised to sell part of the Omaha reserve to the Poncas for a fair price so that the Poncas could move off their Niobrara Reservation. One of the Ponca chiefs who signed this agreement was Standing Bear—this was the first appearance of his name upon any official document pertaining to Ponca history. Why this agreement was never consummated is impossible to determine. A Senate Committee reported in 1880 that the agreement seemed acceptable to the Poncas, the Omahas, and the United States, but for some unexplained reason it was never completed.²² Possibly the source of the purchase funds was never identified; possibly the federal policy of moving all tribes to a

21. The army rifles supplied were indeed old. They were 50 caliber Springfields—not the newer repeating arms which served some Sioux well at the Battle of the Little Big Horn, nor even the single shot 45-70 caliber breech-loading Springfields with which most of Custer's men were equipped. See J. PARSONS & J. DUMONT, *FIREARMS IN THE CUSTER BATTLE* (1953); R. KAIN, *IN THE VALLEY OF THE LITTLE BIG HORN* 36, 38, 62, 65 (1969); M. SANDOZ, *THE BATTLE OF THE LITTLE BIG HORN* 127 (1978). But cf. J. MONAGHAN, *CUSTER* 408 (1971).

22. See SENATE REPORT, *supra* note 19, at V. There is some evidence that the agreement failed because important Omaha chiefs were absent when the agreement was made.

single location, the Indian Territory, conflicted with plans to move the Poncas to the Omaha Reservation.

There is evidence that Standing Bear moved to the Omaha Reservation despite the lack of formal authorization. On September 30, 1875, the Ponca agent (A.J. Carrier) wrote to his Washington superior as follows:

I have the honor herewith respectfully to inform you that I have reinstated Standing Bear as a chief in this tribe, to date from the 11th instant subject to your approval.

This Indian had been on a visit to the Omahas since last winter, having, as he alleges, been prompted to leave his own reservation by reason of the jealousy then existing among the chiefs here, and for fear of the Sioux. He has always appeared to me to be a good man, and I think would make an excellent, even an exemplary, farmer if fair opportunities were offered, where there was no common enemy such as the Sioux to be dreaded.²³

After the move to the Omaha Reservation dropped from consideration, discussion surfaced concerning moving the Poncas to the Indian Territory. Who initiated this shift in destination, or why, is not entirely clear. In the fall of 1874 the Pottawatomie Tribe (located in the Indian Territory) indicated a wish that the Poncas resettle near them. Washington, however, informed A.J. Carrier, the Ponca agent, that no plans were underway for such relocation and that no funds existed to permit Ponca chiefs to come to Washington to discuss the move. Carrier did not drop the matter. In 1875 he visited Washington, and on July 30 he conferred with President Grant about the Ponca move. Carrier later reported that the President stated the Poncas could move to the Indian Territory if they so desired. At this time Carrier felt certain that Poncas would be better off to surrender their old lands to the Sioux.

On September 11 and 23, 1875, Agent Carrier held councils with the Poncas about moving to Indian Territory. A paper was signed after the last council, with Standing Bear as one of the signers, stating the Poncas desired to move and requesting that a delegation of their chiefs visit Indian Territory to select a new reservation. Carrier maintained then, and later, that the paper represented the unanimous opinion of those present at the councils. Standing Bear later repudiated the paper—a position explained on grounds that the Ponca language had no separate word

23. *Id.* at 397 app. Army officers and agency superintendents arrogated to themselves power to decide who should be a tribal or band chief. *See, e.g.*, J. OLSON, *supra* note 18, at 233 (General Crook removed Red Cloud as chief and installed Spotted Tail) and at 271 (agent's attempt to depose Red Cloud). It should be noted that some chiefs reciprocated by conducting campaigns to remove agents they did not like. *Id.* at 264-85 (detailing the intense struggle between Oglala Sioux Chief Red Cloud and Indian Agent McGillycuddy). Standing Bear aided in deposing an agent (Gregory) in the early 1870s. *See* SENATE REPORT, *supra* note 19, at 187 (testimony of Alfred S. Riggs).

for land in the Indian Territory (south of Kansas) and that Standing Bear reasonably thought a move to the Omaha Reservation was the issue.²⁴ Carrier transmitted the signed document to the President, but received no response.

However, on August 15, 1876, the President signed an Indian Appropriations Act containing the following proviso: "*Provided further*, That the Secretary of the Interior may use . . . the sum of twenty-five thousand dollars for the removal of the Poncas to the Indian Territory, and providing them a home therein, with the consent of said band."²⁵ No single reason prompted the Washington decision to relocate the Poncas in the Indian Territory. Moving all tribes to one or more central locations was the national policy at this time. Second, moving the Poncas to placate the Sioux was an attractive solution to their hostile relationship. Third, Nebraskans desired no more Indians be moved into the state. Finally, Sioux City and Yankton business interests wanted the Poncas removed so that the Sioux agencies could be located on the Missouri River because the Sioux agencies served thousands of Indians and such trade would be very beneficial to anyone able to participate in it. On the day following the enactment of the above-quoted law (August 16, 1876), the Ponca agent J. Lawrence informed the Commissioner of Indian Affairs that a council showed many Poncas favored moving, but many others were strongly opposed.

The Ponca removal rested until January 1877, when the Commissioner for Indian Affairs summoned Indian Inspector E.C. Kemble from New York to Washington and gave him written instructions about the removal of the Poncas to the Indian Territory.²⁶ The instructions emphasized the necessity of moving the

24. See SENATE REPORT, *supra* note 19, at 144 (testimony of A.J. Carrier). Carrier testified that Standing Bear suggested removal and that Standing Bear was the "most forceful and eloquent" speaker of all the Ponca chiefs. See SENATE REPORT, *supra* note 19, at 160 (testimony of Susette La Flesche (Inshattheamba—Bright Eyes) for an explanation of Standing Bear's misunderstanding. Carrier testified that the Commissioner of Indian Affairs told him Nebraska Senators objected to the Poncas locating upon the Omaha Reservation, arguing Nebraska had enough Indians already. *Id.* at 152 (testimony of A.J. Carrier).

25. Act of Aug. 15, 1876, ch. 289, 19 Stat. 192 (1876).

26. Former Indian Commissioner George Manypenny, who headed a Commission to obtain further land cessions from the Sioux, wrote to Washington from Cheyenne on August 31, 1876, to say that he could stop at the Ponca reservation and arrange for their removal after he finished with the Sioux. His offer was not accepted. In the fall of 1876, whites generally dictated terms of agreements with Indians. The Battle of the Little Big Horn was fresh in the minds of white policy makers as well as the general white population. See J. OLSON, *supra* note 18, at 222-30. For the most recent chapter of the aftermath of the Manypenny Commission's "agreement" with the Sioux relating to the Black Hills, see *United States v. Sioux Nation of Indians*, 448 U.S.

Poncas because the Sioux agencies were to move to the Missouri pursuant to a recent "agreement" with the Sioux and because the tribes could not be located close to each other.²⁷ Kemble was instructed to sound out the Poncas, and if they were generally favorable towards moving, then he was to take not more than ten principal Ponca men to the Indian Territory for selection of a site for a new reservation.

Kemble held conferences with the tribe on January 26 and 27, 1877, and was met with a cool reaction to the proposed relocation. On January 27 he informed Washington the tribe was willing to give up the old reservation only if the principal men were pleased with the new site and only if they were allowed to come to Washington to finish negotiations. Washington replied that such a visit would be permitted only after those chosen to select a new site had done so and only minor details of settlement remained. Although

371 (1980). Oppressive as Kemble's handling of the Ponca removal proved to be, one wonders if Manypenny would have handled it with more, or less, sensitivity.

27. The recent "agreement" was the document wrung from the Sioux by the Commission headed by Manypenny. One part specified that the Sioux would receive their rations and supplies at points on the Missouri River selected by the President. Another part contemplated moving the Sioux to the Indian Territory, but Congress deleted this provision. See J. OLSON, *supra* note 18, at 231. In September of 1877 the Sioux chiefs conferred with the President in Washington and secured his approval to select agency sites away from the Missouri after the winter of 1877-78. However, the President informed the chiefs they would have to move to the Missouri to receive rations and supplies for the 1877-78 winter because plans for that location were too far advanced to change. In addition, the President pointed out, the Ponca had already been moved to make the Missouri distribution possible. *Id.* at 250-51. The Brule Sioux under Chief Spotted Tail reluctantly moved to the Missouri for the winter of 1877-78, and the Ponca agency, then empty because of the removal of the Poncas, was used by the United States. See L. STANDING BEAR, *supra* note 20, at 89; G. HYDE, *supra* note 14, at 255. Many of the old Ponca buildings were occupied by Brule Sioux during that winter—mostly by "squaw men" and "mixed bloods." Spotted Tail and the "traditionals" defiantly camped almost a hundred miles west of the old Ponca agency, forcing the United States to haul supplies to them there. Spotted Tail moved eastward in the spring to keep better control over the "progressives" camped around the agency.

Although U.S. officials tried to keep the Brule Sioux on the Missouri, Spotted Tail was adamantly against it. He called Indian Commissioner Hayt, who came personally to Dakota Territory to persuade him to change his mind, a "bald-headed liar." See J. OLSON, *supra* note 18, at 260; G. HYDE, *supra* note 14, at 261. Spotted Tail simply announced his group was going to leave, and it did. All Brules were gone by July 29, 1878.

Thomas Tibbles, destined to play a major role in the fate of Standing Bear, claimed he visited Spotted Tail prior to the conference with Commissioner Hayt and advised him to bluff the Commissioner by strong talk. In fact, Tibbles claimed his visit to the Brule leader was instigated by General Crook. See T. TIBBLES, BUCKSKIN AND BLANKET DAYS 189-92 (1969).

Standing Bear was present at these conferences, no official report records any remarks by him.

Inspector Kemble, Ponca agent Lawrence, the agency interpreter, and the ten chosen Poncas (including Standing Bear) left on February 2, 1877, and one week later arrived at the Osage Reservation in Indian Territory. Rev. S.D. Hinman (a Santee missionary) joined the party later. Preparations for the visit to the Osages had not been made, and many of the Osage chiefs were absent. The Ponca delegation was discouraged, not only because no serious business could be conducted in the absence of the Osage chiefs, but also because of the absence of the ceremonies, feasting, and other formalities of a solemn nature which were called for by a visit of another tribe's leaders. In fact, the Ponca delegation concluded that the Osage reception was unfriendly. Washington then authorized Kemble to show land on the Kaw, or even on the Quapaw, Reservations to the Poncas. Thereafter the party left the Osages on February 15 and visited the Kaws, who were friendly and offered the Poncas some Kaw land. The Poncas were now very despondent and desired only to return home to confer with their people. They refused to consider any more land as possible reservation sites, and the group headed for Arkansas City. From there Kemble surveyed some other land, but he went alone because the Poncas refused to leave Arkansas City.

When Kemble returned on the evening of February 19, the Poncas still wished to return home and asked for the means to accomplish the trip. Kemble stated that he was not authorized to do so, but he promised to contact Washington if they would accompany him to Independence, Kansas. He left them alone to discuss the matter, but within the hour eight of the ten men left to return to Dakota Territory; the other two were physically unfit for the taxing journey.

Kemble was enraged by the action of the eight chiefs. He called it "insubordination" and recommended that the departing chiefs be arrested and confined at Fort Leavenworth. Kemble and the remaining members of the party left Arkansas City on February 21, 1877. Agent Lawrence and the two remaining Poncas were dispatched to the Otoe Reservation, where Kemble hoped they could intercept the eight departers. Meanwhile, Kemble and Hinman visited the Quapaw Reservation, and found land there which they considered to be suitable. The two men then headed for the old Ponca Reservation in Dakota Territory by way of St. Joseph, Missouri. Kemble reached the Ponca Reservation on March 10, well ahead of the eight Ponca chiefs who had left the party at Arkansas City.

The eight Poncas who left from Arkansas City walked to the

Otoe Reservation, where they arrived on March 7, 1877. After resting three days, they were given horses, and were able to reach the Omaha Reservation on March 27. While there they dispatched a telegram from Sloan, Iowa, to the President, to inquire whether he authorized the recent events. After waiting several days for an answer which never came, they left to return to the Ponca Reservation, arriving on April 2, 1877. During the journey the participants suffered greatly. The Otoe agent said that their moccasins were worn out when they reached his post and that their feet were bleeding. They had eaten hard corn they scavenged from the fields they passed. They had slept in hay stacks to ward off intense cold. Chief White Eagle (probably the principal chief) sold his tomahawk and a red stone pipe to pay a white man to take them to Wichita.²⁸ In all, the return from Arkansas City to the Ponca homeland had taken over forty days and had caused great hardships. Within four days after the Ponca chiefs left for home, the Federal Government made a decision on the matter. On February 23, 1877, Indian Commissioner Smith dispatched the following telegram to Kemble at Independence, Kansas: "Removal of Poncas will be insisted upon. Spotted Tail and Red Cloud must move this summer to Missouri River. Their presence will render further stay of Poncas at old location impossible."²⁹ Washington authorities first ordered that the Poncas were to be taken to the Kaw Reservation (communication dated February 26, 1877),³⁰ then later the location was changed to the Quapaw Reservation (communication dated March 7, 1877),³¹ because of the fact that Kemble's Quapaw visit had occurred after the first communication.

Even before Kemble returned to the Ponca Reservation, he knew the departure of the eight chiefs made removal more difficult. On March 2, 1877, he informed the Indian Commissioner that troops might now be needed; later events proved him prophetic. When the eight chiefs arrived home, Kemble summoned them, but only two came. Kemble reported to Washington that the chiefs, like the tribe as a whole, were divided on the removal issue. Kemble believed that the half bloods were generally in favor of removal, but that the full bloods were not. He also thought the full bloods intimidated the half bloods, and the "soldiers" of the tribe terrorized the full bloods. Kemble even opined that the "soldiers"

28. See Standing Bear's account of this trip in H. JACKSON, *supra* note 6, at 199-202. Even if Jackson included the account in her book to stir public indignation, there is no evidence that Standing Bear did not utter the words she attributes to him, or that he misrepresented the rigors of the journey. See also SENATE REPORT, *supra* note 19, at 195-96 (testimony of Chief White Eagle).

29. SENATE REPORT, *supra* note 19, at 64.

30. *Id.*

31. *Id.*

instructed the chiefs before they left on the inspection trip not to approve any land.

Between April 2, 1877, when the eight chiefs returned, and April 19, 1877, when Kemble hastened to Washington to explain matters, the Ponca Reservation was in turmoil. Kemble contacted Fort Randall for aid, and its commander dispatched troops. On April 6, thirty troopers arrived during a council conducted by Kemble; the meeting broke up when the Poncas scattered. The next day about ninety persons attended another council and all of the chiefs present spoke. According to Kemble, most were willing to move. Chief White Eagle attempted to shift the destination to the Omaha Reservation, but to no avail. Soon, thirty more troopers from Fort Randall arrived. Thereafter, the Poncas employed a Niobrara lawyer (Solomon Draper) to represent them. He requested Kemble to delay until he could present a legal argument about the Ponca treaty, but Kemble threatened him with arrest for violating federal law: unauthorized presence upon the reserve. The Poncas then alleged that Kemble withheld annuities and rations to force obedience;³² in response, Kemble caused the arrest of Standing Bear and his brother, Big Snake, who were confined at Fort Randall until preparation for the departure was completed.³³

In addition to Ponca resistance, some non-Indians, motivated by diverse reasons, protested the removal. The infantry commander at Fort Randall petitioned to cancel plans to move the Sioux to the Missouri River because he feared that "booze" shops would spring up on the east side of the river (outside the reservation) which, in turn, would lead to disorders after the Sioux patronized them. If the Ponca were not moved, then the Sioux could not be moved and the commander's task would be eased. Reverend Riggs, a Santee missionary, wrote to the Secretary of the Interior, arguing the removal would be unfair and pointing out that the Ponca, unlike the Sioux, were peaceful and made good neighbors. Other protestors of the removal were the Presbyterian missionary at the Yankton Agency, the president of the First National Bank at Yankton, an ex-mayor of Yankton, and the Governor of Dakota Territory, who discussed the removal with the President, only to be referred to the Indian Office.³⁴

32. *Id.* at XII, 163. Kemble denied this charge. Using annuities and rations as bargaining devices was common practice. When Kemble arrived in January 1877 to effect the Ponca removal, he requested Washington to send the Ponca annuities quickly.

33. Standing Bear's own description of this incident may be found in H. JACKSON, *supra* note 6, at 202-03. See also SENATE REPORT, *supra* note 19, at 17 (testimony of Standing Bear), and at 113 (testimony of Kemble).

34. See SENATE REPORT, *supra* note 19, app., and at 176 (testimony of Alfred S. Riggs).

The protests of local non-Indians only compounded the difficult situation which faced Kemble. The Sioux move was unalterably fixed, yet many Poncas were unwilling to move voluntarily. Thus, some force or pressure would be needed to effect the removal. Meanwhile, a change of administration in Washington had occurred in March, and support there for the removal turned lukewarm. But Kemble sought to hold Washington to its prior decision. Finally, on April 12, 1877, Washington told Kemble to proceed, coldly noting that soon the Sioux would move to the Missouri and "if any Ponca decline to go now they will probably follow soon."

On April 16, Kemble informed Washington that he was going to proceed across the Niobrara with the willing Poncas, but that force would be required to move the others. Washington inquired as to how many Poncas refused to go voluntarily and as to how many influential men were in the unwilling group. Kemble and the willing Poncas departed and after they were across the Niobrara, and headed south, Kemble left for Washington on April 19 to explain the entire matter.

In Washington, Kemble conferred with Commissioner of Indian Affairs J.Q. Smith, who was unwilling to proceed alone. Both men consulted Secretary of Interior Carl Schurz, who was also uncertain. Schurz, in turn, requested his Indian Commissioner to confer with General Sherman, who agreed with Kemble that removal should be pressed. Secretary Schurz then agreed.³⁵

After Kemble had left the willing Poncas, the agent, Lawrence, led them to Columbus, Nebraska.³⁶ On April 30, Kemble rejoined this contingent following his Washington visit, but only after making arrangements in Chicago for troops from Fort Sully to be sent to the Ponca Agency. At Columbus, Kemble found Agent Lawrence, Agent E.A. Howard (who was soon given the task of dealing with the Poncas still on the Niobrara), 164 Indians, and 46 wagons. Kemble moved south with the willing group, passing through Beatrice on May 10 and Manhattan, Kansas, on May 24, and the group arrived at their destination on the Quapaw Reservation, Indian Territory, on June 12. Although Kemble's contingent did not expe-

35. See REPORT OF THE SPECIAL COMMISSION TO THE PONCAS, S. EXEC. DOC. NO. 30, 46th Cong., 3d Sess. 50 (1881) [hereinafter cited as PONCA COMMISSION].

36. Kemble was empowered to select the mode of travel and he chose to go overland in lieu of Missouri steamboat. The Poncas thus drove their own teams, pulling wagons loaded with as many of their personal belongings as could be carried. However much personal property could not be taken: household goods, supplies, and farm equipment. This was piled in the buildings, and eventually disappeared—a total loss to the Poncas. In fact, even the logs from which Ponca houses, outbuildings, and fences were constructed were used by others.

rience an easy trip, difficulty with weather and sickness was minor when compared to the journey that the group of unwilling Poncas would soon undertake. After delivering the willing Poncas to Indian Territory, Kemble's relationship with the Poncas ended, except for his involvement in the subsequent arguments concerning the removal.³⁷

37. Kemble's role in the removal was discussed for several years from all angles. Often he was made out to be the villain, although he had some defenders. See, e.g., SENATE REPORT, *supra* note 19, at 6-13 (minority report). Kemble appeared before a Senate Committee appointed to investigate the removal, and he there sparred verbally with Senator Dawes. The discussion centered mostly on whether the Poncas ever consented to move—a statutory prerequisite. The majority report concluded as follows: "There is not only not a shadow of evidence that the Poncas ever gave their consent to removal, but the evidence is positive and overwhelming to the contrary." *Id.* at XI.

Kemble contended that before the inspection trip, the tribe and its leaders freely and voluntarily consented to go to the Indian Territory. He blamed the eight departing chiefs, and the local area people who protested the move after the chiefs returned, for the turn-about in tribal opinion. The refusal of the chiefs to look at other sites, he thought, was petty and exhibited bad faith. The local area people, he thought, were intermeddlers worrying about their own safety if the Sioux moved to the Missouri.

Senator Dawes certainly agreed with the majority report, which said that Kemble was "totally unfitted for the work devolved upon him," and which, in a burst of exaggeration, blamed Kemble for the "hardships and sufferings which have followed . . . [the Poncas] since they were taken by the United States from their old reservation and placed in their present location in the Indian Territory." *Id.* at VIII to IX.

Kemble's attackers seldom noted that before the removal he recommended, in strong language, safeguards to prevent hardship and suffering. For example, on March 2, 1877, he wrote Washington:

[T]hey . . . [the Poncas] should have the services of a thoroughly good and attentive physician, and the care of an agent, directed particularly to their diet and mode of life during the first year or two of their residence there, at least. Otherwise, to send them into that climate is to doom a large number of the tribe to inevitable death from the sudden change.

Id. at 424 app. Unless this were done, Kemble said, the neglect would be "barbarism equal to that of our wildest savages." Kemble arranged for corn plantings before the Poncas arrived, and he reported that when his contingent arrived 300 acres were doing fine.

After the Ponca removal and the *Standing Bear* case became rallying events for persons seeking to reform federal Indian policy, Kemble was often cited as a villain, an image he sought to shed. See his exculpatory letter to Massachusetts Governor Long, who severely criticized Kemble in a December 3, 1880, speech in Boston, PONCA COMMISSION, *supra* note 35, at 46-50. Kemble submitted some evidence, and offered to provide more, to this Commission, which was appointed by President Hayes to recommend a solution to the Ponca question. *Id.* at 50. Wisely, the Commission eschewed delving into the issue.

From a vantage point of more than one hundred years later, it appears the two sides differed on the meaning of the consent required by the statute. Kemble construed the law to be satisfied if the Poncas at any time consented

Following the departure of Kemble's group from Columbus, Agent Howard returned to the old reservation, where he held councils with the remaining Poncas on May 7 and 8. Although the Indians were in an "ugly mood," Howard finally convinced them to move to the Indian Territory, and on May 16 this contingent (mostly full-blood Poncas) crossed the Niobrara; as Kemble later reported, "the last Ponca turned his face southward."

It is clear that Howard's group did not want to leave their homeland: Soldiers were present while Kemble held council and some troops later were used to escort the Indians as far as Columbus. Both Standing Bear and his brother were arrested and confined at Fort Randall in order to neutralize their opposition to the removal. Finally, Ponca families, fearing that force would be used, prepared for the move. What words Howard or soldiers uttered, and what they did beyond talking, is unclear from data now available. Several years later, reformers intent upon changing federal Indian policy described the departure in terms of fixed bayonets and threats to kill or maim.

In what was perhaps the final attempt to delay removal, the Ponca employed a lawyer, Solomon Draper from Niobrara, to intercede on their behalf with the authorities in Washington. Although Draper spoke with the Indian Commissioner, the Secretary of the Interior, General Sheridan, and General Sherman, he could not alter the decision and he was forced to write the Poncas to inform them that he had failed.³⁸ When this final hope faded, the remain-

to move. He also separated consent into two parts: consent to give up claim to the Niobrara reservation and consent to a new reservation site. He contended that consent to give up the old reservation was implicitly included in a consent to move and that, once given, it was irrevocable. Others, for example, Senator Dawes and the eight departing chiefs, believed Ponca consent to the new site was required and only then could the statutory consent be obtained.

Kemble's interpretation was colored by his desire to avoid changes in tribal opinion on the removal issue. He was aware that tribal opinion on removal had been divided for many years, not only over whether the tribe should move, but also over the new location. He learned this on an earlier visit to the tribe. See SENATE REPORT, *supra* note 19, at 382 app. He and Ponca agent Lawrence did not want to engage in a fruitless inspection trip to the Indian Territory, which might result if Ponca removal were conditioned upon approval of a new site. See PONCA COMMISSION, *supra* note 35, at 49. Kemble's concern for speed, efficiency, and unwavering adherence to a decision once fully considered and determined did not then, and does not today, have the same value in Indian culture as in white culture.

38. See SENATE REPORT, *supra* note 19, at 198, 310. Draper fell ill at Ann Arbor, Michigan, and could not report in person to his clients. Draper's representation was not appreciated by Kemble and others in charge of the removal. From time to time his fee (some 30 Indian ponies worth about \$10 each) was mentioned when his role was discussed, but what was wrong with it was not specified. Draper seems to have suffered no harm from his representation.

ing Poncas crossed the Niobrara, turned their faces southward, and began a journey that rivaled the infamous human suffering of the Trail of Tears of the Cherokees in 1838-39.³⁹

Agent Howard kept a day-by-day account of the journey of the Poncas, which was later published by the United States and used effectively by reformers attacking federal Indian policy.⁴⁰ Howard's contingent, numbering over 500, traveled through Nebraska, passing through Neligh (May 22), Columbus (May 29), Seward (June 4), Milford (June 6), Crete (June 9), De Witt (June 10), and through Kansas by way of Marysville (June 16), Burlington (June 30), and Baxter Springs (July 9).

The group encountered bad weather during almost all of the trip. First, the weather was cold, then later heavy rains made many roads almost impassable and swollen streams difficult to ford or cross. By the time the party reached Indian Territory, the summer heat had become oppressive and insects had become bothersome. Both people and livestock were exhausted. The trip was very hard on the children and the elderly. Many Poncas were sick, and in all nine died on the journey.⁴¹

Standing Bear had been released from confinement at Fort Randall in time to depart with the Howard contingent. Thus, he and his family suffered the hardships of the journey. Howard's journal recorded the following:

June 5th. Broke camp at seven o'clock. Marched fourteen miles, and went into camp near Milford. Daughter of Standing Bear, Ponca chief, died at two o'clock of consumption.

June 6th. . . . daughter of Standing Bear . . . was given a Christian burial, her remains being deposited in the cemetery at Milford, Nebraska, a small village on Blue River.⁴²

After recognizing the kindness of the ladies of Milford in assisting in this burial, Howard's journal continued:

It was here that, looking at the form of his dead daughter thus arrayed for the tomb, Standing Bear was led to forget the burial-service of his tribe, and say to those around him that he was desirous of leaving off the ways of the Indian and adopting those of the white men.⁴³

39. See DeRosier, *The Cherokee Indians: Disaster Through Negotiation*, in FORKED TONGUES AND BROKEN TREATIES 33-71 (D. Worcester ed. 1975); BARRY, YUNINI'S STORY OF THE TRAIL OF TEARS (1932); G. FOREMAN, INDIAN REMOVAL (1953); D. VAN EVERY, DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN (1966); D. BROWN, BURY MY HEART AT WOUNDED KNEE 7-8 (1971).

40. See H. JACKSON, *supra* note 6, at 207-17.

41. A Ponca child who died on May 23 was given a "Christian burial" in the Neligh, Nebraska, cemetery. The grave site recently has been marked with a monument.

42. H. JACKSON, *supra* note 6, at 213 (Howard's account).

43. *Id.* A similar resolve appeared later in the eloquent speech Standing Bear

Confused, chaotic, and unsettled would aptly describe the condition of the Ponca for many months after they arrived in the Indian Territory. The legal status of their Niobrara lands was uncertain, and they had no legal claim to any land in the Indian Territory. Even if the United States could have bought land either on the Quapaw reserve or farther west, no purchase had been discussed, let alone consummated. In fact, no one was quite sure about the Quapaw boundary line. More important threats to the Ponca's immediate well-being and to their ultimate survival were the problems of shelter, food, water, and clothing. Agent Howard expressed his assessment of the situation by stating:

It is a matter of astonishment to me that the Government should have ordered the removal of the Ponca . . . without having first made some provision of their settlement and comfort. Before their removal . . . an appropriation should have been made . . . sufficient to have located them in . . . a comfortable house As the case now is . . . these people have been placed on an uncultivated reservation to live in their tents as best they may.⁴⁴

The Ponca were very dissatisfied with the land and living conditions on the Quapaw Reservation. Many became ill and many died. That winter (1877-78) some of the Ponca leaders went to Washington seeking presidential permission to return to their old lands. But the Poncas were told to examine land west of the Quapaw Reservation and to relocate if they found desirable land there. In 1878 a delegation selected land northwest of the Pawnee Reservation at the juncture of the Arkansas and Salt Fork.⁴⁵ According to Chief White Eagle, their agent Whiteman tried to keep them from moving to the new site, but some Poncas went to the new land anyway, and, lacking provisions in the new location, "nearly starved to death."⁴⁶

Even after all the Poncas moved to the new location later in 1878, they suffered greatly and many more deaths occurred. Few Poncas, if any, lived in permanent housing. Very few acres were broken for cultivation and, consequently, not much food was

made at the conclusion of his suit against General Crook; such views formed a pivotal position in Judge Dundy's opinion in the case.

Near Milford the Howard contingent was hit by a sudden tornado on June 7. Every tent was destroyed, wagons were thrown about like straws, and some persons were carried 300 yards by the wind. A child died of storm-related injuries. On June 9 another child died (a niece of Standing Bear's daughter), and the body was returned to Milford to be interred in the same grave as her aunt.

44. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EXEC. DOC. NO. 1, 45th Cong. 2d Sess. 496 app. (1877).

45. Standing Bear was present when the President told the Poncas to select a new site, and Standing Bear assisted in selecting the new site. See T. TIBBLE, *THE PONCA CHIEFS* 14 (1972).

46. *PONCA COMMISSION*, *supra* note 35, at 16 (testimony of Chief White Eagle).

raised. Food from other sources was inadequate and sanitation, particularly a healthful water supply, was neglected. Poncas alleged that their agent refused to issue stoves and farming implements, although they were on hand and available. Reports of the number of Ponca deaths ranged from a few over one hundred to two hundred.⁴⁷

Standing Bear moved to the new location, but he was very unhappy and despondent over the deaths. Indian Commissioner E.A. Hayt visited the new site in October 1878 and later told Interior Secretary Schurz:

During my visit . . . I ascertained that Standing Bear was dissatisfied, but that he was the only one among the chiefs who showed a bad spirit. He was constantly grumbling, and held aloof from the other chiefs, and seemed full of discontent, which he took no pains to conceal, while the other Poncas were at work. The agent informed me that he expected that Standing Bear would leave the Agency at the first favorable opportunity. It was not thought expedient at that time to put him in confinement, as one chief out of ten or twelve was hardly of sufficient importance to deal with in that manner.⁴⁸

In January 1879, Standing Bear and twenty-nine others left Indian Territory at night without informing the agent and headed north in three covered wagons and one spring wagon. The party possessed twenty dollars in cash and a few rations. Within twenty days their resources were exhausted and they were forced to beg for corn from a white man in order to feed their hungry ponies. When the white man observed the Poncas parching some of the grain for themselves, he brought them flour, meat, and coffee. The party traveled through Kansas, and were able to obtain other aid along the way. On March 4, 1879, in very poor condition, they reached the Omaha Reservation.⁴⁹ The Omahas offered the Pon-

47. A month-by-month tabulation by the agency clerk showed 117 deaths between July 1877 and December 1880. Figures for two months were missing and the tabulation did not include, for a 3 month period, deaths which occurred in the large body which about May 1, 1878, left the Quapaw reserve for the new site on the Salt Fork without permission of the agent. See PONCA COMMISSION, *supra* note 35, at 45. Tribes often were silent or vague about deaths because those reported affected the amount of food issued.

48. Hayt to Schurz, April 10, 1879, quoted in T. TIBBLES, *supra* note 45, at 47-48.

49. Standing Bear's account of this flight is contained in T. TIBBLES, *supra* note 45, at 15-16. See also T. TIBBLES, *supra* note 27, at 197-98. Standing Bear emphasized that the death of his last son in the Indian Territory and his promise to bury him in the land of his ancestors were major reasons for the flight. Although the death and ensuing promise may have been the immediate cause of his disaffection, there is evidence that Standing Bear never intended to make the Indian Territory his home. He stated that he was told he could return to live with the Omahas if he did not like conditions in the south and that he went south because his wife's relatives went. T. TIBBLES, *supra* note 45, at 13-14.

cas the use of land for raising food and those who were able to work entered upon that task.

The arrival of the Poncas on the Omaha Reservation spawned a series of communications prerequisite to their arrest and return to the Indian Territory. Messages went from the local Indian agent to the Commissioner of Indian Affairs, then to the Interior Secretary and finally to the Secretary of War. In turn the War Department orders came down the chain of command, to General Sherman, then to Lieutenant General Sheridan in Chicago, then to Brigadier-General Crook in Omaha, then to the commander of Fort Omaha and finally to Lieutenant W.L. Carpenter, of the 9th U.S. Infantry. Lieutenant Carpenter took four men from his regiment to the Omaha Agency and arrested the Poncas. The captives were returned to Fort Omaha, Nebraska, where they were held prior to returning them to the Indian Territory.⁵⁰

At this point Thomas Henry Tibbles, an assistant editor for the *Omaha Daily Herald*, learned that the Poncas were at Fort Omaha and visited them on Sunday, March 30.⁵¹ Tibbles wrote the only record of that Sunday meeting, noting he first had to overcome their reluctance to talk because of a council scheduled with General Crook for the following day. Finally several Poncas, including Chief Standing Bear and his wife, reviewed the history of the tribe, particularly its difficulties after being moved to the Indian Territory. The Indian speakers asked Tibbles questions which he could not answer:

Why were they imprisoned when they had committed no crime?

Why were they not free to live where they willed?

Why did not the same laws apply to Indians as applied to whites?

Why would it not be better for the United States to permit the Poncas to farm and raise their own food instead of providing rations for their

50. The arrest was solely an army operation. Indian Office employees kept away from the scene. Both Poncas and Omahas wept and wailed at the parting. Many of the Poncas were ill. One Ponca woman was too ill to be moved. One Ponca, Lone Runner, refused to go voluntarily and he was tied and moved under guard some distance behind the main body. Standing Bear made a speech to the lieutenant stating he did not want to go, but he offered no other resistance. See T. TIBBLES, *supra* note 45, at 16, 55, 64, 77-79; 25 J. BOURKE, *DIARY* 74 (microfilm, original on file in the U.S. Military Academy Library, West Point, New York).

51. Tibbles wrote two accounts of his connection with the Ponca case. In one he stated that the city editor alerted him to the Ponca's presence at Fort Omaha, see T. TIBBLES, *supra* note 45, at 18; in the other he stated it was General Crook who visited him, see T. TIBBLES, *supra* note 27, at 193. It is possible to reconcile the two versions: the city editor's contact was at 11 p.m., March 29, and Crook's visit occurred at 1 a.m., March 30. On this point see T. TIBBLES, *supra* note 45, at 141-42 (notes on the text); King, "A Better Way": General George Crook and the Ponca Indians, 50 NEB. HIST. 239, 242-45 (1969).

subsistence?⁵²

The Indians stated they had long been aware wild game was gone, never to return, and they had decided farming was necessary. The Poncas informed Tibbles that Indian policy should be directed to securing land for each Indian and protecting his claim to that land, educating adults in the ways of farming, and educating Indian children in the same manner as white children.⁵³

After this conference Tibbles returned to Omaha and solicited the aid of several church congregations and their ministers. One minister, who knew Interior Secretary Schurz, drafted a telegram requesting that the Secretary revoke the order to return Standing Bear's group to the Indian Territory. This began a long struggle by Tibbles, and soon many others, to aid the Poncas and, more importantly, to forge federal Indian policy along entirely new lines.

On March 31, General Crook held a council in his office with some of the Ponca prisoners. Eight whites, including Tibbles, the only civilian, were present. Chief Standing Bear was the main speaker for his group. Crook's aide, Captain John G. Bourke, recorded the following in his diary:

Standing Bear, the head man, was a noble looking *Indian*, tall and commanding in presence, dignified in manner and very elegantly dressed in the costume of his tribe. He wore a shirt made of blue flannel, having collar and cuffs of red cloth, ornamented with brass buttons, leggings of blue flannel, mocassins [*sic*] of deer skin, and over his shoulders was draped a beautiful blanket, one half red, the other half blue. . . . The most striking feature in his attire was a necklace of claws of the grizzly bear, of which he appeared highly proud.⁵⁴

The history of the treatment of the Poncas was reviewed at great length by the Indian speakers as they earnestly sought support for their desire to return to the old reservation. Although military personnel indicated sympathy with the prisoners' plight, General Crook indicated he could do nothing but obey orders.⁵⁵

52. Tibbles' account of his Sunday meeting is in T. TIBBLES, *supra* note 45, at 19-27. Apparently Tibbles and the Ponca prisoners were the only participants.

53. T. TIBBLES, *supra* note 45, at 19-27.

54. 25 J. BOURKE, *supra* note 50, at 76-77 (emphasis in original). Bourke's Diary contains a verbatim account of much of the conference. Tibbles included accounts in both of his books—THE PONCA CHIEFS, *supra* note 45, at 29-32, and BUCKSKIN AND BLANKET DAYS *supra* note 27, at 197-98—but Bourke's account is the most complete.

55. Bourke's diary reported that Standing Bear pleaded:

Oh my *Brothers* and my *Friends* outside. I want you to look at me and take pity on me, and help me to save my women and children.

My *Brothers and Friends*—as I am saying, there is somebody clamping me down to the ground. I need help to get that man off of me, so I can stand up. I need help.

25 J. BOURKE, *supra* note 50, at 83-84 (emphasis in original). General Crook's position was recorded by his aide as follows:

After the three-hour conference ended, Tibbles dispatched items about the Poncas to newspapers in New York, Chicago, and several other large eastern cities. He also wrote several articles which appeared in the *Omaha Daily Herald*—one of which concluded that to send ill Poncas back to the Indian Territory would be nothing “less than heartless, cruel murder.”⁵⁶

Tibbles’ dispatches to eastern newspapers produced sympathetic new items, but no freedom for the Poncas at Fort Omaha. Secretary Schurz had ignored the telegram sent by the Omaha ministers and had given no orders to free the Poncas. Tibbles decided it was time to use other tactics. As he recounted, he read the United States Constitution, particularly the newly added Fourteenth Amendment, and decided to find out if an Indian was “a man” or “a brute”; whether an Indian “had any rights which a white man was bound to respect.”⁵⁷

Tibbles’ initial hurdle—neither he nor the Ponca prisoners had funds to hire an attorney—was surmounted by persuading a member of the bar to serve without charge. Tibbles contacted John Lee Webster, who agreed to serve provided Tibbles could secure co-counsel. Tibbles then persuaded A.J. Poppleton to assist.⁵⁸

There was very little time since the journey back to the Indian Territory might start at any time. Although Crook was sympathetic to the prisoners’ plight and could delay until the ill prisoners could travel and their stock was rested, he would have been forced to obey orders fairly soon. Thus, Webster and Poppleton filed an application for a writ of habeas corpus in the United States Circuit

It’s not our place to give them money; they must get that from *Washington*. We will give them plenty to eat while they are here. I know it is very hard and painful for them to go down and it’s just as hard and painful for us to have to send them there.

Id. at 87 (emphasis in original).

56. See, e.g., *The Last Indian Outrage*, *Omaha Daily Herald*, Apr. 1, 1879, at 4, col. 3.

57. T. TIBBLES, *supra* note 45, at 33-34. Other passages in this book indicate Tibbles focused upon the equal protection clause of the fourteenth amendment. He analogized the Ponca case to the rights of blacks—a fight in which Tibbles had previously been engaged. See T. TIBBLES, *supra* note 27, at 29-57. Tibbles was not totally inexperienced in legal matters. He had “read” law (Blackstone, Pufendorf and Chitty—the latter he called the “most infernal book that was ever printed.”) in a Winterset, Iowa, law office. *Id.* at 29, 145.

58. Both lawyers were well-known and experienced. Webster had been President of the 1875 Nebraska Constitutional Convention, see NEB. CONST. art. 17 (Authentication Clauses), and Poppleton was counsel for the Union Pacific Railroad, see T. TIBBLES, *supra* note 27, at 199. Tibbles and Webster had both attended Mount Union College in Ohio, and there is evidence Webster specifically requested Poppleton to be his co-counsel. *Id.* at 147; T. TIBBLES, *supra* note 45, at 34-35.

Court for the District of Nebraska.⁵⁹

The Application alleged simply that the applicants were illegally deprived of their liberty, that they had committed no crime, that they were ignorant of the reason for their arrest and confinement, and that they desired the court to inquire into the matter and order their release. Very importantly, they alleged that they were "separated from the Ponca Tribe of Indians . . . [which was] located in the Indian Territory." Judge Elmer Dundy issued the writ on April 8. The original return merely outlined the orders under which General Crook acted; it was later amended to allege that the Ponca prisoners had not severed their tribal relationship nor were they "pursuing the habits and vocations of civilized life."⁶⁰

The trial began on May 1 and lasted approximately two days. The applicants presented three witnesses: Standing Bear, Lieutenant Carpenter, and Willie W. Hamilton, a twenty-two year old employee at a store on the Omaha Reservation. The defendant (General Crook), represented by United States District Attorney G.M. Lambertson, presented no witnesses. The only factual matter in dispute was whether the Ponca applicants had abandoned or severed their tribal relationship and had assumed the characteristics of "civilized" life. All three counsel argued the legal points at great length: Webster opened with about a six hour argument; Lambertson followed with about a five hour argument; and Poppleton closed with about a four hour argument.⁶¹

59. The application, dated April 4, 1879, is quoted in full in T. TIBBLES, *supra* note 45, at 36-39. The return is quoted in T. TIBBLES, *supra* note 45, at 39-45. The application listed 26 Poncas, as did the verification. However only eight names appear at the end of the application and on the verification. Tibbles and Lt. Carpenter (the arresting officer) were witnesses. Standing Bear's name was listed first in all places.

60. T. TIBBLES, *supra* note 45, at 44. The Poncas' attorneys had difficulty locating Judge Dundy—one account stated he was engaged in a bear hunt. See T. TIBBLES, *supra* note 27, at 199. Apparently at one time the trial was scheduled for Lincoln, see T. TIBBLES, *supra* note 45, at 36; King, *supra* note 51, at 247; the writ was actually issued from Lincoln on April 8, 1879, and a short hearing was held in Lincoln on April 30. The trial was held in Omaha. See Daily Nebraska State Journal, Apr. 30, 1879, at 2, col. 2. The amendment was added to the return on the last day of the Omaha trial. General Crook's name appeared on the amendment without his consent. He objected strenuously, on the ground that he did not believe the facts alleged were true. Judge Dundy patiently explained to the General that he signed in his capacity as a government official and not as a private citizen, but the General could not accept this legal distinction. Thus, General Crook, the defendant in the proceeding, never agreed with the facts alleged over his name. See T. TIBBLES, *supra* note 45, at 45.

61. A verbatim account of the testimony is contained in T. TIBBLES, *supra* note 45, at 66-90. The arguments were covered in Tibbles' news accounts. See

When all lawyers concluded, Judge Dundy allowed Standing Bear to address the court—his remarks were interpreted sentence-by-sentence. The Chief rose, extended his hand toward the bench, and for an embarrassingly long time stood in that posture, and then, according to Tibbles, spoke: "That hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be the same color as yours. I am a man. God made us both."⁶² Standing Bear then described his desire to return to the traditional Ponca home on the Swift Running Water (the Niobrara), and said: "a man bars the passage. . . . I . . . must obey his orders. If he says that I cannot pass, I cannot. The long struggle will have been in vain."⁶³ After a long pause, the Chief looked at Judge Dundy and concluded: "You are that man."⁶⁴

Tibbles reported that General Crook leaned forward, covered his eyes with his hands; women spectators sobbed and tears appeared on the judge's face; then the entire assemblage shouted approval of the speech. General Crook, followed by the entire audience, shook Standing Bear's hand.⁶⁵

On May 12, 1879, Judge Dundy rendered his judgment and released his opinion.⁶⁶ He ordered all the applicants "discharged from custody."⁶⁷ His opinion first addressed the argument raised by District Attorney Lambertson that an Indian was not entitled to invoke the jurisdiction of a federal court. This argument rested upon two points: first, there was no United States precedent allowing an Indian to invoke federal jurisdiction; second, under English law only citizens were entitled to the writ of habeas corpus and Indians were "outside" the governmental system established by and for non-Indians.⁶⁸

Omaha Daily Herald, May 3, 1879, at 3, col. 1; *id.*, May 4, 1879, at 2, col. 1; *id.*, May 6, 1879, at 2, col. 2; *id.*, May 7, 1879, at 2, col. 2.

62. T. TIBBLES, *supra* note 27, at 201.

63. *Id.*

64. *Id.*

65. *Id.* at 201-02.

66. United States ex rel. Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891). The opinion was also reported by Circuit Judge John F. Dillon, 5 Dill. 453.

67. There is evidence that Judge Dundy was affected greatly by the nature of the case. He stated in his opinion that never before had he been called upon to decide a case "so strong to my sympathy." United States ex rel. Standing Bear v. Crook, 25 F. Cas. at 695. He also noted that the defendant, General Crook, "has no sort of sympathy in the business in which he is forced by his position." *Id.*

68. Lambertson even objected to Standing Bear's competency as a witness at the trial, but was overruled. The district attorney, perhaps unwisely, rested part of his argument upon the *Dred Scott* case. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

If the English law was as Lambertson claimed, Judge Dundy said it was "at a disadvantage when compared with our own."⁶⁹ He conceded Lambertson's point that no Indian had ever before invoked the habeas corpus jurisdiction of a federal court, but he called Lambertson's conclusion that the Poncas were therefore excluded a "non sequitur."⁷⁰ Judge Dundy cited the federal habeas corpus statute's⁷¹ language providing that "parties" and "persons" may seek the writ and concluded that the "comprehensive language . . . appl[ies] to all mankind"⁷² In words strikingly similar to those used by Standing Bear, the Judge stated: "I must hold, then, that Indians are 'persons'"⁷³

Once jurisdiction was established, the Judge reached the second question, which he phrased as: "whether or not an Indian can withdraw from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto for the purpose of making an independent living and adopting our own civilization."⁷⁴ The right of a citizen to expatriate himself had long been debated in America, but in 1868 Congress declared the right of expatriation existed and equated it with the "natural and inherent right of all people . . . to . . . the rights of life, liberty and pursuit of happiness"⁷⁵ Judge Dundy easily concluded that Indians possessed the right to withdraw from their tribe.

The only remaining issue was whether the United States had power to control the place of residence of Indians who had severed tribal ties. Judge Dundy could find no statute or treaty conferring such power upon the United States; he concluded that no "such arbitrary authority exists in this country."⁷⁶ Dundy did find a federal law authorizing federal officials to remove any person from an Indian reservation "whose presence may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians."⁷⁷ He concluded that the United States could lawfully order military authorities to remove the Poncas from the Omaha Reservation, but the law required that the military surrender the removed persons to civilian authority, something which had not been

69. United States ex rel. Standing Bear v. Crook, 25 F. Cas. at 696.

70. *Id.* at 697.

71. REV. STAT. U.S. ch. 13, §§ 751-766 (1873-1874).

72. United States ex rel. Standing Bear v. Crook, 25 F. Cas. at 697.

73. *Id.*

74. *Id.* at 699.

75. REV. STAT. U.S. § 1999 (1878). For discussion of recent issues arising from the loss of citizenship, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 278-80 (1978). Most recent cases concern the power of Congress to deprive persons of citizenship—not the power of a person to voluntarily surrender citizenship.

76. United States ex rel. Standing Bear v. Crook, 25 F. Cas. at 700.

77. *Id.* at 699.

done with the Poncas.⁷⁸

The subsequent history of Standing Bear's case is important for two reasons: first, its impact on Standing Bear and his band; second, its impact on broader federal Indian policy. Although many events relate to both points, the case's history relating to the Poncas will precede discussion of its broader significance.

Dundy's opinion freed the Poncas held at Fort Omaha, but freed them to do what? To go where? One must remember the opinion permitted the United States to arrest persons (including Ponca Indians) who were present without permission on reservations not their own. After Dundy's ruling, Standing Bear was warned by his lawyers that he would be arrested if he set foot on any reservation. However, unidentified government lawyers apparently informed Standing Bear that he could safely return to his old reservation. As soon as he received this advice, Standing Bear, according to Tibbles, one morning "unsuspiciously, without a word to any of us, made a beeline for the Niobrara."⁷⁹ Upon discovering this, Tibbles borrowed two fast horses from an Omaha Indian and with a young Indian, rode 120 miles in eighteen hours, and intercepted Standing Bear south of the Niobrara, where he and his group were waiting for daylight to cross the dangerous river. The Poncas were brought back to camp just "outside" the Omaha Reservation.⁸⁰ Later the Standing Bear group occupied land (probably islands) in, or near, the Niobrara. They remained there until the final settlement of the mix-up which placed Ponca land in the Great Sioux Reservation.⁸¹

78. Neither counsels' arguments nor Judge Dundy's opinion followed Tibbles' legal analysis. See note 56 *supra*. Tibbles' idea that the key was the fourteenth amendment was faulty. That amendment by its very language was, and is, limited to action taken by, or under the authority of, state power. The vice holding the Poncas was federal, not state. Tibbles should have read the fifth, not the fourteenth, amendment. One should not fault Tibbles too much since his services, even if based upon faulty legal reasoning, were responsible for filing the case, and no one reading law in Blackstone, Pufendorf, or even the "infernal" Chitty would learn about the fourteenth amendment!

79. T. TIBBLES, *supra* note 27, at 203.

80. *Id.* After the Poncas were released from custody on May 19, Standing Bear, according to Tibbles, gave his beaded buckskin leggings to Tibbles, his war-bonnet to Poppleton, and his tomahawk to Webster with an eloquent speech:

Hitherto, when we have been wronged we went to war . . . We took the tomahawk . . . and went to kill.

But you have found a better way. You have gone into the court for us, and I find that our wrongs can be righted there. Now I have no more use for the tomahawk. I want to lay it down forever.

I lay it down; I have no more use for it; I have found a better way.

T. TIBBLES, *supra* note 45, at 114. (Emphasis in original).

81. Helen Hunt Jackson reported in her book, *CENTURY OF DISHONOR*, that they were on an island in the Niobrara "fortunately . . . overlooked when the

District Attorney Lambertson filed an appeal from Dundy's judgment, but no appellate court ever considered the case.⁸² Although freed from the possibility of a reversal, the Standing Bear Poncas were not very free. They could return to the Ponca Reservation in the Indian Territory, but that offered more sickness and death. They could not accept the offer of land from their ancient kinsmen, the Omahas, because of the threat of arrest. The same fear prevented them from going to any part of the old Ponca Reservation included in the Sioux grant. Indeed, they were a band without a country, forced to live upon aid from private sources, mainly the Omaha Ponca Committee, chaired by Bishop Clarkson.⁸³

United States . . . took . . . possession of the rest . . . and presented it to the Sioux." H. JACKSON, *supra* note 6, at 369 app. The island may have been south of the thalweg (the middle of the main channel of current) of the Niobrara, and thus within Nebraska and outside the Great Sioux Reservation. Solomon Draper, the lawyer from Niobrara who tried to prevent the 1877 removal, testified in March 1880 that the Standing Bear band was located on the Niobrara, in a willow thicket, two miles from Niobrara on land belonging to a "Mr. Hullihen." See SENATE REPORT, *supra* note 19, at 313 (testimony of Solomon Draper).

82. Secretary Schurz claimed he could not agree with the legal points argued by Lambertson, so he advised the Attorney General, who then ordered the appeal dropped. See H. JACKSON, *supra* note 6, at 362 app. On the other hand, the Federal Cases Reporter contains the following note appended to Dundy's opinion:

At the May term, 1879, Mr. Justice Miller refused to hear an appeal prosecuted by the United States, because the Indians who had petitioned for the writ of habeas corpus were not present, having been released by the order of Dundy, District Judge, and no security for their appearance having been taken.

United States ex rel. Standing Bear v. Crook, 25 F. Cas. at 701. Webster and Poppleton reported to the Omaha Ponca Committee on July 13, 1880, as follows:

[T]he U. S. District-attorney took the case to the United States Circuit Court . . . by appeal, and about May 19th, upon hearing before Mr. Justice Miller, Associate Justice of the Supreme Court of the United States, was there continued, and on January 5, 1880, the appeal was dismissed on the motion of the U. S. District-attorney.

H. JACKSON, *supra* note 6, at 373 app. Thus, even if the United States had desired an appellate review, mootness might have prevented it.

83. The other members of the Omaha Ponca Committee were: Rev. A.F. Sherrill, Rev. W.I. Harsha, Leavitt Burnham, W.M. Yates, and P.L. Perine. See H. JACKSON, *supra* note 6, at 370 app.

There is evidence that the Santee Agency, east of the old Ponca Reservation, was authorized to give supplies to the Standing Bear Poncas, but Tibbles advised against it, fearing acceptance would make them "reservation" Indians and thus subject to federal power. Clark, *Ponca Publicity*, 29 MISS. VALLEY HIST. R. 495, 504 (1943). See *Report of Santee Agent Isaiah Lightner in REPORT OF THE SECRETARY OF THE INTERIOR*, H.R. EXEC. DOC. NO. 1, 46th Cong., 2d Sess. 212 (1879); PONCA COMMISSION, *supra* note 35, at 38 (testimony of David Le Clair).

Schurz, of course, did not agree with Dundy's decision. He said: "If judi-

From the date Standing Bear's group was released (May 1879) until the fall of 1880, Tibbles, the Omaha Ponca Committee, and others struggled to reunite the entire Ponca Tribe on the old Niobrara Reservation. Others, for example, Secretary Schurz, Indian Commissioner Hayt and their supporters, struggled to permit the Sioux to retain the Niobrara land and to compensate the Poncas for the old reservation and for other wrongs which occurred during the 1877 removal.

Shortly after Dundy's decision, Tibbles and the Omaha Committee dispatched the Omaha Chief, Iron Eye, and his daughter, Bright Eyes, to the Indian Territory to visit the woman's uncle, White Swan, and report on the condition of the Poncas still in Indian Territory.⁸⁴ They reported that living conditions were very poor and that the Poncas there desired to return to the Niobrara. Tibbles, with Henry Fontanelle as interpreter, visited the Poncas in the Indian Territory in June 1880. Tibbles instructed them not to

cial proceedings should result in spreading among the Indians the impression that they can leave their places of abode and roam about at pleasure, the effect would only be disastrous to them." REPORT OF THE SECRETARY OF THE INTERIOR, *supra*, at 22.

Military commanders above General Crook were not at all pleased with Dundy's decision. General Sherman wrote the Secretary of War on May 20, 1879, as follows:

Inasmuch as Judge Dundy has released from custody the Ponca Indians who escaped from their agency, where they were fed and maintained by the Indian Bureau, I think it would be fair to allow him in his charity to feed and clothe them. They are, in fact, paupers turned loose on the community by him, and he should assume the task and expense of their maintenance. If the Ponca Indians prefer to rely on him, I suppose the army can well allow him to assume that function.

SENATE REPORT, *supra* note 19, at 480 app. The lack of logic in the view that federal judges should be responsible for the needs of persons they release from custody in habeas corpus proceedings says little for military reasoning and much about the intensity of the military's feelings about the Standing Bear decision.

Dundy predicted this aftermath. He wrote in his opinion that he would decide the case "without reference to consequences or criticisms, which, though not specially invited, will be sure to follow." *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. at 698.

84. Iron Eye was Joseph La Flesche, Bright Eyes was Susette La Flesche, and White Swan was Frank La Flesche. See T. TIBBLES, *supra* note 27, at 205. The La Flesche family was very important in the history of the Omaha Tribe. See A. FLETCHER & F. LA FLESCHÉ, *supra* note 3. Bright Eyes (Inshtatheamba) was involved intensely in both the Ponca incident and in the later struggle to reform federal Indian policy. Before she and her father inspected conditions of the Poncas in Indian Territory, she had assisted the Ponca cause, writing letters on their behalf. Later she worked tirelessly for federal policy reform. Tibbles and Bright Eyes were married June 29, 1882. She was present with her husband at the Wounded Knee episode in South Dakota in 1890, and she helped nurse the Indian survivors. She died in 1903. See T. TIBBLES, *supra* note 45, at 129-37; T. TIBBLES, *supra* note 27, at 8, 294, 300-16.

sign any paper pertaining to their Niobrara lands. Later, when he tried to see the chief of the Nez Perce, he was arrested and removed from the Indian Territory. He obeyed attorney Webster's advice to return to Omaha.

Secretary Schurz and the military thought Tibbles was a nuisance and a threat and used their power to insulate him from the Poncas, other tribes in the Indian Territory, and tribes in South Dakota. Tibbles urged the Poncas in the south to steal away in small groups as Standing Bear's band had done. He assured them they would be given aid and, if necessary, protection by the courts. The Poncas in the Indian Territory did not understand this method of proceeding and were fearful of arrest if they left. There is evidence that some federal officials attempted to stop Omaha Indians from communicating with Ponca friends and relatives in the south; other federal officials asserted the legal position that property, such as wagons and horses, furnished the Ponca remained United States property and could not be taken off the reservation.⁸⁵

After the successful conclusion of the habeas corpus suit, Webster and Poppleton filed suits in the federal courts of both Nebraska and South Dakota seeking to establish the superiority of the Ponca title to the old reservation. Two suits were filed in each

85. See Chief White Eagle's letter, which Bright Eyes brought back from her trip. T. TIBBLES, *supra* note 45, at 118-21. Tibbles' version of his trip with Henry Fontanelle is in T. TIBBLES, BUCKSKIN AND BLANKET DAYS, *supra* note 27, at 224-35. See White Eagle's testimony at an 1880 Senate Committee hearing examining the Ponca case, SENATE REPORT, *supra* note 19, at 194; White Eagle's testimony before the Special Presidential Commission to the Poncas, PONCA COMMISSION, *supra* note 35, at 19; *id.* at 29 (testimony of Rev. J. Owen Dorsey, Indian missionary before the same body, detailing his letter-writing for the Omahas and why he stopped); *id.* at 42-43 (letter from W. Whiting, Ponca Indian Agent, to Commissioner of Indian Affairs R.E. Trowbridge, dated June 24, 1880, describing Tibbles' visit to the Poncas, and the Commissioner's June 28, 1880, reply ordering Tibbles' arrest if he were found on the reservation). Secretary Schurz's position was that the Poncas were better off in the Indian Territory, that efforts to induce them to run away were ill-advised, and that he was alarmed that efforts to get the Sioux to leave their reservations were occurring. REPORT OF THE SECRETARY OF THE INTERIOR, *supra* note 83.

The Nez Perces visited by Tibbles had as much, or more, trouble in the Indian Territory than did the Poncas. After they surrendered on October 5, 1877, in Northern Montana, 431 were imprisoned at Fort Leavenworth. In July 1878 those still alive (410) were located on the Quapaw Reservation, where about one-fourth died. Their leader, Chief Joseph, visited Washington and secured permission to move to a new location; he chose one northwest of the Ponca. The Nez Perce desired to return to the Pacific Northwest as much as the Ponca desired to return to the Niobrara. Tibbles sought to nourish this desire by his visit. Eventually (1885) all Nez Perce returned, but to two different reservations: Lapwai in northern Idaho and Colville in Washington. See H. HOWARD, SAGA OF CHIEF JOSEPH 339-58 (1978).

state; one naming the Sioux Nation as a defendant, and one naming Chief Red Cloud, individually and as head of the Sioux Nation, as a defendant. The Nebraska case against Chief Red Cloud resulted in a judgment for the Ponca Tribe on December 3, 1880.⁸⁶ However, by then, extra-judicial events which eventually settled the Ponca claim to the old reservation were underway.

Prior to Standing Bear's flight from the Indian Territory and his subsequent habeas corpus victory, all Poncas were located in the Indian Territory. Many were dissatisfied, even after the tribe selected and moved to a new location away from the Quapaw Reservation. However, Washington officials hoped the Poncas' living conditions would improve and they would stay. The Indian Bureau, supported by Schurz, urged Congress repeatedly to appropriate money to pay the Poncas for their land and property lost by relocation in the south and to buy the Indian Territory land the Poncas occupied. After Standing Bear's flight and court-ordered freedom, the tribe was split, one group attempting to regain control of the old reservation and the other staying in the Indian Territory, not entirely happy, but concerned about its fate if it left.

Persons in support of restoring the Poncas to their old reserva-

86. On December 3, 1880, Judge Dundy found that the Ponca Tribe had a legal estate in the lands claimed (those located in Nebraska) and that the Sioux Nation had wrongfully kept the Ponca Tribe out of possession. He ordered that the Ponca Tribe recover possession. *Justice at Last*, Omaha Daily Herald, Dec. 4, 1880, at 8, col. 4. Bourke clipped this account and placed it in his diary.

A status account of the cases was given to the Omaha Ponca Committee by Webster and Poppleton on July 13, 1880. See H. JACKSON, *supra* note 6, 372-74 app. The two Nebraska cases were filed on April 3, and May 18, 1880; the South Dakota cases were filed on May 20, 1880. Service on the defendants was secured only after great difficulty. There is evidence that Spotted Tail successfully avoided service, maybe with the assistance of the Rosebud agent, who feared disturbances if the Ponca won back their old reservation. See SENATE REPORT, *supra* note 19, 486 app.

The habeas corpus action broke new legal ground—so new that Lamberston used that fact to support his objections to the court's jurisdiction. But the Ponca suits against Red Cloud and the Sioux Nation not only lacked solid precedent, but also presented difficult issues with widespread significance. They raised such issues as: Could one tribe sue another tribe without the latter's consent? If this were not possible because of sovereign immunity, could the Ponca Tribe sue a Sioux tribal official? Was Red Cloud the proper official to represent the Sioux Nation? Was the United States an indispensable party-defendant, in view of its interest, both as trustee for both tribes and as a party to the Ponca and Sioux Treaties? What kind of title did the Ponca obtain by their treaty? Which treaty, the earlier or the later, settled title to the land? Many of these issues were later decided, but Poppleton and Webster were not involved in those cases. See D. GETCHES, D. ROSENFELT & C. WILKINSON, *supra* note 9, at 258-61. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

tion secured the introduction of a bill to accomplish this aim. These persons either assumed the Ponca title was superior to that of the Sioux, or accepted reports that the Sioux and Ponca had settled that issue by some sort of "treaty" or "agreement."⁸⁷ One such bill (Senate Bill 1298) was referred to a Senate Select Committee, which conducted a lengthy hearing and issued a full report concerning Ponca history, the Standing Bear case, and future Indian policy. Standing Bear (with Bright Eyes as interpreter) was the initial witness, followed by Tibbles and many others. The most active committee member was Senator Dawes from Massachusetts. Secretary Schurz appeared and admitted that when he became Secretary he was not well informed on Indian affairs and that had he known in 1877 what he later discovered, he would not have ordered the Ponca removed.⁸⁸ This bill did not reach the Senate floor, and congressional efforts to solve the Ponca matter were apparently stalemated.

As early as June or July of 1880, the Poncas in Indian Territory expressed a desire to settle matters. Their agent (Whiting) told them to discuss it among themselves and reach an independent conclusion. On October 25, twenty Poncas sent a letter to the Commissioner asking permission to travel to Washington to relinquish

87. Facts concerning the Sioux-Ponca peace efforts are difficult to find at this date. No written document appears to have survived, or maybe none was ever prepared. The best conclusion, based upon available evidence, is that the Sioux might have agreed several times to permit the Poncas to "occupy" the old Ponca reserve, but the occupancy was akin to a "tenancy at will," and the Sioux wanted payment from the United States if the Ponca title were to be as good as it was before the 1868 mix-up. See, e.g., SENATE REPORT, *supra* note 19, at 122 (testimony of Bishop William Hare); *id.* at 153 (testimony of Ponca Agent A.J. Carrier); *id.* at 216 (testimony of White Eagle); *id.* at 284 (testimony of Edwin J. Brooks, Chief Clerk of the Indian Office, Washington, D.C.); G. HYDE, *supra* note 14, at 143 ff.; PONCA COMMISSION, *supra* note 35, at 31-32. Some of the Standing Bear band apparently felt they had a paper from the Sioux granting title, but the paper they produced was simply a pass to visit the Sioux. Another Ponca witness testified: "They gave us the land in council, but gave us no paper." *Id.* at 40 (testimony of Smoke-maker).

Even if the Sioux had granted title back by a legal instrument, it probably would have been void under the Indian Nonintercourse Act, Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (1834) (current version at 25 U.S.C. 177 (1976)). See *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977).

88. At this time the Commissioner was pushing a plan to award the Poncas \$140,000, \$120,000 of which was payment for the old reservation (96,000 acres at \$1.25 per acre) and the balance (\$20,000) was payment for other removal damages. The \$140,000 would be expended as follows: \$48,389.46 to purchase the new reservation from the Cherokees (101,894 acres at 47.49 cents per acre); the balance (\$91,610.54) invested at 4% would return \$3,664.42 each year to the Poncas. Obviously this plan did *not* contemplate Standing Bear's group living on the old Ponca Reservation.

their rights to the old reservation and secure title to the new reserve. On November 9, permission was granted, and on December 22 ten Ponca headmen signed an agreement in Washington accepting \$140,000 as payment for the old Niobrara Reservation, property lost in the removal, and spoils caused by Sioux attacks.

Concurrently with these events President Hayes became involved in the matter. On December 18, 1880, the President appointed a special Commission to investigate the Ponca case and to report to him its recommendations. The members were General Crook, General Miles, William Stickney, and Walter Allen. The Commission met with the Ponca headmen then in Washington on December 24; held hearings on the Ponca Reservation in the Indian Territory on January 5 and 6, 1881; and met Standing Bear and his followers in the "Academy of Music" at Niobrara City, Nebraska, on January 11 and 12.

The Commission found that the Southern Ponca desired to stay on the Indian Territory reservation while the Northern Ponca desired homes on the old reservation. The change in Southern Ponca opinion was caused by several factors. First, since the beginning of 1880, living conditions had improved immensely. One of their agents (Whiteman) had been removed for dereliction in performing his duties. During his tenure, farming efforts lagged and permanent housing failed entirely. He was removed on the last day of 1879 by Indian Inspector Pollock. By February 1880, Pollock had sixty-nine houses constructed, and by May of that year Chief White Eagle reported that none of his people lived in tents. Second, the health of the tribe had improved, no doubt due as much to improved sanitary conditions⁸⁹ as to acclimatization. Third, the Poncas decided a move to a new territory would be harmful to their own efforts to improve their condition since each move set back housing and farming efforts. Fourth, some of the adversities experienced in the north were absent in the south, for example, Missouri River floods and grasshopper devastations. Finally, they did not receive the help they expected from the group which aided Standing Bear. Only a few followed Tibbles' advice to slip away unannounced.

The Northern Ponca, on the other hand, were content with living on the old Ponca Reservation. They claimed it still existed and considered their own negotiations with the Sioux to have settled the title mix-up. The Sioux were now friendly; some had intermarried with the Ponca.

Standing Bear was the leader of the Northern Ponca, and he

89. See C. BARNES, *THE SOD HOUSE* (1970), in which the author assigned improved sanitation as the reason for improved health and declining death rates on the frontier.

spoke long and eloquently during the hearings at Niobrara City. However, his speeches contained traces of bitterness and anger, against the United States for its removal actions, against the Secretary of the Interior Schurz, and against the Southern Poncas' relinquishment of rights to the old reservation. After the hearings it was evident that Standing Bear and his followers would do nothing to make Chief White Eagle's hope that the Poncas would reunite in the south a reality; nor would the Southern Poncas return to their old homeland.⁹⁰

The Commission reported to the President on January 25, 1881. It recommended:

(1) Each Ponca man, woman, and child should be allotted 160 acres of land, either in the north or the south, as the allottee wished. The title was to be inalienable and not taxable for thirty years after date of the patent.

(2) \$25,000 should be expended for agricultural implements, seed, and stock—\$5,000 of this for the Northern Poncas and the re-

90. See Chief White Eagle's answer to Allen's inquiry whether it was right to sign away the old reservation if Standing Bear wanted to stay there: "We did not think about Standing Bear. We were hoping that he would come back. He is but one chief up there. We are many chiefs and many people down here, and we hoped he'd come back here . . ." PONCA COMMISSION, *supra* note 35, at 20. Standing Bear stated to the Commission: "I wish to take back my own people from the Indian Territory. I wish them to live." *Id.* at 31. The Commission encouraged Chief White Eagle to accompany it to Niobrara City, but he demurred, saying he was "very tired and you seem in a great hurry. I can't go now." *Id.* at 20. Chief Standing Buffalo stated, "I am sick. White Eagle can attend to this business." *Id.* at 21. White Eagle desired to send a letter instead, but General Crook said that would not do. The Commission permitted the Southern Ponca to council, and they selected two to go along: Hairy Bear and Cheyenne.

Before the hearings at Niobrara City, Standing Bear warmly greeted Hairy Bear and Cheyenne at the "Hubbard House," the best in Niobrara City, by kissing them, but he merely touched cheeks with Peter Primeaux who was the interpreter for the other two. Primeaux was an Indian policeman, and the shooting of Big Snake, Standing Bear's brother, bothered Standing Bear. See 38 J. BOURKE, *supra* note 50, at 980.

Hairy Bear informed the Commission and the listening audience that if Standing Bear returned south, "White Eagle would yield the head position in the tribe to him." PONCA COMMISSION, *supra* note 35, at 34. Cheyenne also spoke in conciliatory terms, but Standing Bear ended the discussion, saying, "I have no other words to say to them (meaning the Poncas who had come from Indian Territory.)" *Id.* at 35.

When General Crook observed the gulf between the two factions widening, he suggested they meet and talk. That night, Bourke's diary recorded, a huge dance was held and drums kept everyone awake until the early morning hours of January 12. The gulf between the two groups was not lessened; the next day Standing Bear said he would not "give them . . . [the three envoys from the south] any word . . ." *Id.* at 39.

maining \$20,000 to be divided among the families of the entire Ponca tribe (proportional to the size of the family).

(3) \$5,000 should be expended for housing for the Northern Poncas and \$5,000 for providing them a school house.

On February 1, 1881 President Hayes accepted the Commission's plan of settlement and presented to Congress the Commission's report and a verbatim transcription of all testimony taken by it.⁹¹

Congress soon appropriated \$165,000 to be expended as follows:

For the Indian Territory Poncas:

- (1) \$50,000 to purchase 101,894 acres from the Cherokees.
- (2) \$10,000 to purchase cattle and draft animals.
- (3) \$10,000 in per capita payments.

91. The events immediately preceding and following appointment of the Commission are fully documented in the Commission's record, PONCA COMMISSION, *supra* note 35, as follows: Letter from the Ponca headmen requesting permission to come to Washington, at 41 app. (Item A); Commissioner's letter granting permission, at 42 app. (Item B); agreement signed in Washington by Southern Ponca Chiefs, at 18; President Hayes' appointment of the Commission, at 5, 13; testimony given in the Indian Territory, at 17-27; testimony given at Niobrara City, at 30-41; majority report of the Commission, at 5-6; minority report (by Walter Allen), at 6-13; President Hayes' submittal message, at 1-4. Hayes' message is also in VII J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 630-34 (1900).

Crook's long-time aide, Captain John G. Bourke, was authorized to accompany the Commission. His personal diary records several relevant facts absent from the Commission's official report. Bourke recorded that one Northern Ponca's reference to Secretary Schurz as the "Dutchman with the eye glasses" was not included in the official transcript. There is no doubt that the Northern Poncas did not like the Secretary, including, probably, Bourke himself. Standing Bear at one point provoked laughter from his followers when he said to the Commission, "If the Secretary is sick or foolish, I hope you'll act as physicians and treat him . . ." 38a J. BOURKE, *supra* note 50, at 97. PONCA COMMISSION, *supra* note 35, at 31, does not record the laughter.

Bourke's diary recorded that before the Niobrara hearings started the official party visited the Standing Bear camp located on a large island in the Niobrara River a few miles from town. The Indians numbered about 115 persons in 28 families. Standing Bear later estimated that the Northern Poncas numbered at least 177. Apparently quite a few fled to other tribes on the eve of removal and joined Standing Bear when he returned. A few left the southern reservation after Standing Bear's court triumph and joined him. On the day of the visit the group was distributing blankets received from the Omaha Ponca Committee; some were housed in teepees and some in log houses.

The heavy South Dakota snows encountered by the Commission in January 1881 contributed to a large Missouri River flood, which caused extensive damage at Yankton several months later. The Nebraska village of Green Island across the river from Yankton was entirely swept away. Vermillion was so heavily damaged its inhabitants permanently removed to higher ground. See W. HURT & W. LASS, FRONTIER PHOTOGRAPHER 119-25 (1956). Thus white settlements suffered from the power of the same river which earlier had swept away Ponca land and buildings.

For the Dakota Poncas (Standing Bear's band):

- (1) \$5,000 to construct dwellings.
- (2) \$5,000 for school purposes.
- (3) \$5,000 for agricultural implements, seed and livestock.
- (4) \$10,000 in per capita payments.

For the benefit of all Poncas in both groups:

- (1) \$70,000 as a permanent trust fund—the interest (5% per annum) to be divided annually among all Poncas.⁹²

Neither President Hayes' Commission, nor Congress' law provided an answer to a major issue: Where were the Standing Bear Poncas going to live? The Commission recommended and Congress ordered that all Poncas be given land in severalty in either the old or the new reservation, as they chose; however, much of the old reservation was still part of the Great Sioux Reservation. As the Secretary reported, no one could build new dwelling houses for the Northern Poncas because they had "as yet no settled title to any land. . . ."

In August 1881 representatives of the Oglala, Brule, and Standing Rock Sioux traveled to Washington and agreed in writing to cede to the United States land located in the old Ponca Reservation sufficient to equal 640 acres for each Northern Ponca head of family and unmarried male twenty-one years or older.⁹³ Now a body of land existed from which the Northern Ponca (or for that matter *any* Ponca) might select land for allotment in severalty.

However, nine years elapsed before the Northern Poncas received allotments in severalty on the old Ponca Reservation. This delay was attributable to efforts of the United States to reduce the size of the Great Sioux Reservation. Finally this reduction was accomplished by an 1889 law which created six reservations in South Dakota (Pine Ridge, Rosebud, Standing Rock, Cheyenne River,

92. Act of Mar. 3, 1881, ch. 132, 21 Stat. 422 (1881). Rather ironically, Secretary Schurz resigned on March 4, 1881, just one day after this action initiated settlement of a matter which brought him much grief and criticism.

93. The agreement may be found in REPORT OF THE SECRETARY OF INTERIOR, H.R. EXEC. DOC. NO. 1, 47th Cong., 1st Sess. 38-40 (1881). Omaha and Winnebago delegations were also brought to Washington, possibly to be asked for a land cession if the Sioux refused. Brule Chief Spotted Tail was selected by his tribe to go (August 5, 1881), but he was assassinated by Crow Dog just before the group departed. See G. HYDE, *supra* note 14, at 299-300. White Thunder represented the Brules; Red Cloud, the Oglalas. It will be noted that the Sioux received no consideration for the cession. Red Cloud dominated the meeting and was in a generous mood. One wonders whether the United States would have obtained the cession as easily, or as cheaply, if Spotted Tail had been the Brule spokesman. See J. OLSON, *supra* note 18, at 275. White Thunder was later killed by Spotted Tail's son in part of a bitter Brule power struggle. There is no evidence that the Ponca matter was particularly divisive, but it was a governmental decision facing Brule leadership, and thus a part of the background. See G. HYDE, *supra* note 14, at 298-308.

Crow Creek, and Lower Brule). The law also provided for other groups of Indians in Nebraska and South Dakota (*e.g.*, Santee, Ponca, and Flandreau). The law provided allotments for the Ponca were to be selected in the following amounts: (1) each head of family—320 acres; (2) each single person over eighteen—160 acres; (3) each orphan child under eighteen—160 acres; and (4) every other person under eighteen—80 acres.⁹⁴

Finally, on August 26, 1890, Ponca Sub-Agent James E. Helms wrote: "Within the last month or six weeks allotments were made to the Ponca Indians in severalty."⁹⁵ He also reported:

Some 60 of the Poncas, with Standing Bear at their head, ran away from their reserve in the early part of last spring. . . . About one-half of them have now returned and promise to remain and cultivate their farms. I feel that Standing Bear alone is responsible for this trouble.⁹⁶

The agent reported that while this group absented themselves from the reserve the allotments were made and Poncas who had remained "changed their selections in order to get the improvements and in some instances the superior land that was left by Standing Bear's party, believing that the absent ones would not return to claim the abandoned homes." The agent concluded:

Standing Bear is a shrewd, cunning savage, one who, if his intellect was directed in a channel to benefit his people, could do much good; but as he now is he is the only one of the Ponca band who persists in the old savage way. He still has two wives. It may be that he will change for the better, as his last trip has resulted so disastrously to his following. I think his influence over the Poncas is at last about gone.⁹⁷

94. Act of Mar. 2, 1889, ch. 405, § 12, 25 Stat. 892 (1889) (Section 13 pertained to the Ponca); *cf.* Act of Apr. 30, 1888, ch. 206, § 13, 25 Stat. 99 (1888) (amount of land in the allotments fifty percent less).

For the story of United States negotiations with the Sioux to obtain further land cessions during this period, see J. OLSON, *supra* note 18, at 286-308 (history of ill-fated "Edmunds Commission"), and at 308-19 (efforts of the "Foster Commission").

The Ponca allotments on the old reservation totaled 27,235.90 acres. *See Ponca Tribe v. United States*, 183 Ct. Cl. 673, 687 (1968). The allotments were subject to twenty-five-year restraints on alienation. Act of Mar. 2, 1889, ch. 405, § 10, 25 Stat. 891 (1889). The restraint was continued until the effective date of the 1934 Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934), by Exec. Order No. 2374 (1916) and Exec. Order No. 4407 (1926), and then extended indefinitely by the Indian Reorganization Act. *See* 25 U.S.C. § 462 (1976). All restraints ended on September 5, 1965. *See* 25 U.S.C. §§ 971, 974(b) (1976) (termination of federal supervision over the Ponca Tribe of Native Americans of Nebraska).

95. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EXEC. DOC. NO. 1, 51st Cong. 2d Sess. 146 app. (1890).

96. *Id.*

97. *Id.* Rev. John E. Smith, missionary at the agency, stated that the Poncas "took kindly to this measure [the allotment law] and manifested great interest, and for the most part exercised sound judgment, in selecting their lands." *Id.* at 147 app. He was not as kind when writing about Standing Bear:

Only Ponca Indians selected allotments upon the Ponca land which had been mistakenly placed in the Great Sioux Reservation by the Laramie Treaty. On October 23, 1890, President Harrison proclaimed that the Indian title to the unallotted lands in that area was extinguished.⁹⁸

While this treatment of the Ponca as reflected in these laws and the *Standing Bear* case obviously vitally affected the small Ponca tribe and its members, it was destined to be a catalyst for far-reaching changes in federal Indian policy affecting thousands of Native Americans everywhere. It is this result, rather than the actual holding, which makes *Standing Bear v. Crook* historically significant. This statement, and the following discussion, is not intended to tarnish the lustre of the holding itself. Without the efforts of Tibbles, Webster, Poppleton, the members of the Omaha Ponca Committee, and the courageous decision by Judge Dundy, Standing Bear and his small band would have been forcefully returned to the Indian Territory. History would have been denied one bright page exhibiting man's humanity to fellow men, and one of the few praiseworthy episodes in nineteenth century White-Indian relations as well as an example of the superiority of law over force as a solution to human problems. But, as Standing Bear and

This wily and crafty chief, seeing the emoluments of his office slipping away from him because of the growing intelligence of the Poncas, too lazy to work, but not too proud to beg, hatched in his idle brain the scheme of selling this land and of removing his immediate followers to Indian Territory, leaving the rest to starve for aught he cared, to spend his remaining days in the pleasures of the dance and harem. He has been and returned, a sadder and seemingly a wiser man. The most unfortunate thing in the whole movement is that he, the prime mover and instigator of the whole scheme, a man who has brought repeated disaster upon his people, had his home and land reserved for him, while many of his followers, who but for his pernicious conduct would have steadily gone forward towards civilization, have lost the homes and land which they prized far more than he did his.

Id.

98. 1 C. KAPPLER, *supra* note 10, at 946. The old agency and school grounds (S 1/2, SE 1/4, Sec. 26 and the S 1/2, SW 1/4, Sec. 25, all in T. 32 N., R. 7 W. of the 6th P.M.) were reserved from entry or settlement.

The Ponca Indians (the Ponca Tribe of Indians of Oklahoma joined by the Ponca Tribe of Native Americans of Nebraska) sued the United States for damages under the Indian Claims Commission Act, 25 U.S.C. §§ 70 to 70r-1 (1976), for taking the old Ponca Reservation on the Niobrara. The Commission, and later the Court of Claims, reviewed the facts of this historical event, and the latter body concluded that the United States was entitled to a credit against any damages the Ponca might later recover for the \$48,389.46 paid to the Cherokees for the new Ponca Reservation in Indian Territory, but was not entitled to a credit for the acres allotted to Standing Bear's band on the old reservation. See 17 Indian Cl. Comm. 162 (1966), *aff'd in part, rev'd in part*, Ponca Tribe v. United States, 183 Ct. Cl. 673 (1968).

his followers discovered, freedom to move off the reservation and to sever the tribal relationship, did not provide a place to live, food to eat, or clothing to wear. No opinion by a federal judge could supply those things. However, before the nineteenth century closed a new federal Indian policy, which supporters thought would supply those necessities, was in operation—enacted in large part because of the case of *Standing Bear v. Crook* and the work by the men and women involved in it.

Tibbles may not have envisioned a broad attack upon federal Indian policy when he first interviewed Standing Bear and his fellow prisoners at Fort Omaha. However, shortly after Judge Dundy's decision, Tibbles, and others he persuaded to assist, attacked on a broader front. Tibbles, viewing the plight of all Indians in the same light as he had previously viewed the issue of slavery of the black race, resigned his newspaper position at the *Omaha Daily Herald* and commenced a fight to "free every Indian in the country from ever again dreading that the whims of anyone in Washington could willfully control his person or his belongings and could hinder his liberty to live his life reasonably."⁹⁹

99. T. TIBBLES, *supra* note 27, at 204. Tibbles' crusade over the next few years was motivated by several events as well as by his personal views. First, Secretary Schurz did not respond to the appeal for aid sent by the Omaha ministers. Second, a letter from Commissioner Hayt to the Secretary (April 10, 1879) charged that Standing Bear was "constantly grumbling" and "full of discontent. . . while the other Poncas were at work." Tibbles considered this an unfair attack. In addition the letter charged that efforts to attract public attention to the Ponca cause were made by "grossly misrepresenting the circumstances of the case," *id.* at 47-48, in effect charging Tibbles with falsehoods because he had sent the dispatches to the newspapers. Third, Tibbles believed the report of distressing conditions in the Indian Territory which Bright Eyes and her father reported after their inspection trip. Fourth, he was urged on by others, including, according to Tibbles, General Crook. *Id.* at 204. And finally, his dispatches to eastern newspapers provoked very sympathetic responses. T. TIBBLES, *supra* note 45, at 33.

Tibbles and his fellow reformers were aided by public opinion on the outrageous treatment accorded two other bands of Indians about this time: the Northern Cheyenne and the Nez Perce. After surrendering at Fort Robinson in the spring of 1877, the Northern Cheyenne were sent to Indian Territory in the fall, where for a year they suffered from inadequate housing, disease, and insufficient food. A large number of them left Indian Territory without permission on September 9, 1878. They were finally discovered by the military and lodged at Fort Robinson. On January 3, 1879, Washington ordered that they be returned to the Indian Territory. They refused and soon broke for freedom from the barracks where they were confined. The military pursued the fleeing Indians and killed many. *See* M. SANDOZ, *CHEYENNE AUTUMN* (1953); D. BROWN, *supra* note 39, at 315-31. Coincidentally, at about the time the Northern Cheyenne were breaking out of Fort Robinson's barracks, Standing Bear's band was stealing away from the Indian Territory.

In January 1877, the government ordered the Nez Perce to vacate the Wal-lowa Valley in eastern Oregon and move to a reservation in northern Idaho

In late June 1879 Tibbles went east to spread the facts about the Ponca case, to discuss the treatment of other Indians, and to raise funds for the fight to reform federal Indian policy. He was received well in Chicago and warmly in Boston. In Boston he met and impressed the great reformer, Wendell Phillips, who encouraged Tibbles to continue his efforts, but warned he would be the target of personal criticism.¹⁰⁰

Soon after Tibbles' return to Omaha (September 6, 1879), the Omaha Ponca Committee invited Bright Eyes and Standing Bear to speak before a local church group. Although Bright Eyes was overcome with emotion and could not conclude, her words and demeanor electrified the audience.¹⁰¹ This set the stage for a second, and larger, eastern speaking tour using Tibbles, Standing Bear, Bright Eyes, and her brother, Woodworker (Frank La Flesche). Bright Eyes was motivated to join because her tribe, the Omahas, feared removal to the Indian Territory.

On the afternoon of October 29, 1879, just prior to a public reception to be held in Boston, Tibbles and Standing Bear received two sad messages—Tibbles' wife had died in Omaha and Big Snake, Standing Bear's brother, had been shot and killed in the Ponca

(Lapwai). Reluctantly they started to move—after being threatened with force and after one chief (Tulhulhulsut) was arrested and confined in the guardhouse. During the move some young warriors murdered several whites, and the 1877 "Nez Perce War" followed. The Nez Perce, pursued by military forces all the way, fled some 1800 miles eastward across Idaho and Montana, through Yellowstone National Park, and back into Montana before surrendering (October 5, 1877) in the Bear Paw mountains in north central Montana. The last sentence of the surrender speech of their chief (Joseph) is as memorable as the one Chief Standing Bear delivered after his habeas corpus victory: "I will fight no more forever."

Despite the fact that General Howard and Colonel Miles promised Chief Joseph at the time of surrender that the Nez Perce would be returned to Lapwai, the captives were first imprisoned at Fort Leavenworth (November 1877 to July 1878), and then later settled on land in the Indian Territory. Later, *see* note 85 *supra*, the Nez Perce were returned to the northwest. *See* H. HOWARD, *supra* note 85, *passim*; D. BROWN, *supra* note 39, at 299-314. One author concluded that settlement of the Ponca matter paved the way for the return of the Nez Perce. *See* R. MARDOCK, *THE REFORMERS AND THE AMERICAN INDIAN* 189 (1971).

100. In Chicago when Tibbles mentioned the names of Secretary Schurz and Commissioner Hayt, a voice from the audience yelled, "Hang them." *See* Clark, *supra* note 83, at 500. From that time on emotions ran high on both sides. *See* note 101 *infra*.
101. Tibbles reported that men in the audience "swore—there in church with the bishop on the platform," and one in the audience yelled: "If I were Standing Bear, I would let the courts go hang. I'd take my tomahawk and scalping knife and follow the trail of the Secretary of the Interior. Then I'd settle the thing right there!" T. TIBBLES, *supra* note 27, at 212.

agency office in Indian Territory.¹⁰² Tibbles, grief stricken, was ready to give up and go home, but Standing Bear consoled him and urged him on, reminding him that many Indians grieved over the deaths of their loved ones: "You suffer greatly but they suffer more. Promise me that you will not forsake them."¹⁰³ Tibbles and Standing Bear continued the tour. Many receptions and meetings in Boston, New York, Philadelphia, Washington, and other places were held in the fall of 1879 and the early months of 1880 before the party returned to Omaha. Famous literary figures joined the reform movement. The most important person of letters influenced by the speakers was Helen Hunt Jackson. Her interest in the fed-

102. The killing of Big Snake is a lengthy story:

On May 13, 1879, Big Snake and 65 other Poncas left their agency to visit the Cheyennes, even though permission for such visits had been refused by their agent, William H. Whiteman. At Whiteman's request the army arrested the group and confined Big Snake (and two others) in the military guard-house. Big Snake's defiance might have been prompted by his brother's habeas corpus case. Agent Whiteman recommended confinement "until the tribe has recovered from the demoralizing effects of the decision recently made by the United States District Court in Nebraska, in the case of Standing Bear." Letter from Whiteman to Commissioner Hayt, May 21, 1879, in *LETTER FROM THE SECRETARY OF THE INTERIOR*, S. DOC. NO. 14, 46th Cong., 3d Sess. 4 (1881). General Sherman made clear the effect he would give to Judge Dundy's decision when he authorized the arrest of the Poncas. He stated in a May 22, 1879, letter to General Sheridan at Chicago: "The release under writ of *habeas corpus* of the Poncas in Nebraska does not apply to any other than that specific case." *Id.* at 5.

Big Snake was released after several months imprisonment and returned to his Indian Territory reservation about August 4, 1879. On October 20, 1879, Whiteman wrote Hayt that he feared Big Snake might assault him and recommended that Big Snake be arrested, conveyed to Fort Reno, "and there confine[d] for the remainder of his natural life." *Id.* at 6. On October 25, General Sherman ordered General Sheridan to cause Big Snake to be arrested and "held in custody till released by superior authority." *Id.* at 7. On October 31, 1879, a military detail attempting to arrest Big Snake in Agent Whiteman's office found him strongly opposed and a very powerful man. Although unarmed, Big Snake resisted mightily and could not be felled by rifle-butt blows to his head. In the course of the struggle, a corporal killed Big Snake with one rifle shot to the head.

Characterization of the homicide varied greatly. A subsequent Army investigation placed emphasis upon the bad "reputation" of the victim, his resistance to arrest, and the smallness of the arresting force and hinted that Big Snake's actions before the shooting reasonably supported a belief he had a knife. *Id.* at 11-15. On the other hand, others called the shooting a "cowardly, willful murder." See *SENATE REPORT*, *supra* note 19, at 259 (testimony of Inspector Pollock). When the Crook Commission visited the Indian Territory Poncas in January 1881, White Eagle pleaded for indemnity for the killing, but General Crook said it was beyond the power of the Commission. See *PONCA COMMISSION* *supra* note 35, at 27. Senator Dawes' hostile attitude toward Secretary Schurz developed in part because nothing was ever done about Big Snake's killing. See 112 CONG. REC. 1056-59 (1881).

103. T. TIBBLES, *supra* note 27, at 214.

eral treatment of Indians was whetted by listening to the speakers from Nebraska; it is possible they were entirely responsible for her interest. Her January 1881 book, *A Century of Dishonor*, related the history of some of the harsher federal treatment of Indians, including a full account of the Ponca case.¹⁰⁴

Far more important than the Nebraska speakers' successes in interesting literary personages in the battle to reform federal Indian policy was their ability to gain the ear of persons with political power. The former could write articles and books, but only the latter could draft laws. Two important events which eventually led to federal reform were: first, the formation of a Boston committee containing important political figures; second, the increasing interest of United States Senator Dawes of Massachusetts in federal Indian policy.¹⁰⁵

Although from 1882 to 1887 Tibbles and Bright Eyes made other speaking trips eastward (and even to England), their connection with the reform movement (and Standing Bear's association also) essentially ended when they returned exhausted to Omaha in April of 1880. Shortly after their return, Congress settled the Ponca issue by accepting the Crook Commission suggestion that the separate groups be allowed to choose where to stay. The Omahas' fear of removal ceased in 1882 when Congress authorized their allotments in severalty,¹⁰⁶ thus, the danger which had ini-

104. Tibbles stated, "I strongly doubt if we could ever have won without her help." *Id.* at 216. He also claimed he turned over much material to Helen Jackson, which she used in writing *CENTURY OF DISHONOR*. Others do not agree with Tibbles' assessment of the importance of Jackson's support. See R. MARDOCK, *supra* note 99, at 185-86.

105. The Boston committee grew out of a meeting of Boston merchants held on November 25, 1879. The Governor of Massachusetts and Mayor of Boston were on the five-person committee. It is clear that the committee had heard Tibbles, Bright Eyes, and Standing Bear. The committee examined minutely the Ponca case and engaged in a written debate with Schurz about it. See *Committee on the Removal of the Ponca Indians*, WESTERN AMERICANA: FRONTIER HISTORY OF THE TRANS-MISSISSIPPI WEST 1500-1900, Reel No. 63, No. 612 (Microfilm, 1975) [hereinafter cited as *Committee on the Removal of the Ponca Indians*].

Without doubt Senator Dawes' interest in Indian affairs was first kindled by the events in Boston, refueled by testimony about the Ponca case (including that of Tibbles, Standing Bear, and Bright Eyes) he heard as a member of an 1880 Senate Select Committee, and finally fanned into anger and indignation by his later concern over the shooting of Big Snake and his feud with Secretary Schurz.

106. See Act of Aug. 7, 1882, ch. 434, § 2, 22 Stat. 341 (1882). Tibbles and Bright Eyes met ethnologist Alice C. Fletcher in Boston in 1879. In the fall of 1881 they conducted her on a tour of the Omaha, Ponca, and some Sioux settlements. Standing Bear hosted them when they visited his band on the Niobrara. This was Alice Fletcher's first opportunity to observe American Indian culture in the field. She assisted in obtaining passage of the Omaha allot-

tially motivated Bright Eyes to join the tour had been removed. Some of the tour's techniques had not been pleasing to Standing Bear and Bright Eyes. For example, Standing Bear appeared before eastern audiences in his native garb: long hair, blanket, feathers, toothed necklace, and moccasins. Although this attracted audiences and added force to his words (which Bright Eyes translated), it was not entirely to Standing Bear's liking. In truth it was contrary to the theory of Judge Dundy's opinion that Standing Bear had broken away from Indian customs and tribal life.¹⁰⁷ There is evidence that the effectiveness of the tour waned. Not everyone believed all the facts which the speakers presented, and furthermore, the focal point of the reform was now in Congress, not in public meeting halls.¹⁰⁸ The campaign for reform had become

ment law, and she later spent many years studying the Omaha culture. She, together with Francis La Flesche (Bright Eyes' brother), authored a book on the ethnology of the Omahas in 1911. See T. TIBBLES, *supra* note 27, at 236-94; R. MARDOCK, *supra* note 99, at 220; 2 A. FLETCHER & F. LA FLESCHÉ, *supra* note 3, at 635-42.

107. One authority reported that Standing Bear rebelled in New York and was about to shorten his long hair and doff his Indian attire when Helen Hunt Jackson induced Bright Eyes to persuade him to wait until the tour was completed. Clark, *supra* note 83, at 507. The same author reported that Bright Eyes wore Indian clothing too, but Tibbles stated both she and her brother dressed in "civilized style." See T. TIBBLES, *supra* note 27, at 213. Bright Eyes undoubtedly was somewhat ill at ease since she was well-educated and must have been confused by the role she was required to assume. She was uncomfortable in being introduced in England as an "Indian Princess." *Id.* at 298. She would not have approved of the name "Bright Eyes" used here. *Id.* at 217.

The bust of Standing Bear in the Nebraska Capitol Building thoroughly depicts him as an Indian. In this author's estimation, the bust does little to convey the peaceful nature of the subject and is not completely faithful to the case of *Standing Bear v. Crook*, which emphasized the severing of Indian ties.

If Judge Dundy's opinion had later become the basis for many similar suits, lawyers and judges would have had great difficulty applying his theory that Indians were free from government control if they severed tribal ties. Consider evidence produced by Webster and Poppleton at the trial in Omaha: the dress, language, work habits, and religious beliefs and practices of the petitioning Poncas. T. TIBBLES, *supra* note 44, at 66-90. The difficulty may also be tested by asking how the Northern Cheyenne, imprisoned at Fort Robinson waiting to be returned to the Indian Territory, or Chief Joseph and his Nez Perce, imprisoned at Fort Leavenworth waiting transfer to a reservation, or even Big Snake, confined in the guardhouse at Fort Reno waiting to return to his Ponca Reservation, would have fared in a federal habeas corpus case. Bright Eyes worried while on the speaking trips that even she could be returned to the Omaha Reservation in Nebraska. See T. TIBBLES, *supra* note 27, at 219.

108. One authority stated that Helen Hunt Jackson doubted the veracity of Tibbles and Bright Eyes, and that Dawes thought the Nebraskans would serve the Ponca cause better by going home. L. PRIEST, *UNCLE SAM'S STEPCHILD*

increasingly bitter and personal. Wendell Phillips' prediction that Tibbles would be personally attacked came true.¹⁰⁹ Thus, while the Nebraska speakers had focused the nation's attention upon serious matters, others would carry on to the finish.

The "finish" occurred on February 8, 1887, when President Cleveland signed the General Allotment Law, commonly referred to as the "Dawes Act." The central feature of the Act was the allotment of land in severalty to individual Indians. Until this Act was passed, most lands reserved for Indians were owned "communally" or "jointly." Under the Dawes Act individual Indians owned described land. Tibbles was in favor of the allotment policy because it would prevent the evil he perceived to be the most vicious: relocating Indians at the "whim" of persons in power in Washington. Tibbles claimed that the Boston committee asked him to draft an allotment law and that he gave his draft to committee member James B. Thayer, professor of constitutional law at Harvard. He claimed that Thayer made a few changes, sent it to Washington, where more changes occurred, but that essentially the Dawes Act followed his original draft.¹¹⁰

DREN 78 (1942). One of the reports of the Boston committee stated that although it believed Standing Bear and Bright Eyes, it would rely upon facts in official government reports. *Committee on the Removal of the Ponca Indians*, *supra* note 105.

109. Tibbles was accused of using the speaking tour as a means of livelihood and as a source of funds to provide necessities for Standing Bear's band. Tibbles' defense was that he did not retain control over any of the money raised. See T. TIBBLES, *supra* note 27, at 206, 217. The strong feeling of opposition is apparent in the following letter sent to Schurz by a friend when Tibbles married Bright Eyes:

[T]his . . . act of the pale-face is in the line of the other wrongs perpetrated upon this most unfortunate band of Indians, and . . . [I fear] that the confiding Indian maiden may some day feel that the fate of Big Snake was preferable to the unhappy one which she has chosen.

Will Dawes hold the Department responsible for this? Will Governor Long [Massachusetts] add it to his long list of indictments? Let us hope that both may take a rose-colored view of the union between the dusky daughter of the forest and the gay professional philanthropist who buried all the wrongs of her race in a greater one upon herself. I fear poor Bright Eyes has made a mistake, but I am willing to forgive her if the act effectively disposes of Tibbles. Even so great a sacrifice may be rare economy if it gives the Nation a rest from the vexatious borings of the Tibbles school of philanthropy.

4 F. BANCROFT, *SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ* 147-48 (1913) (letter of A. Bell).

Despite such gloomy forecasts, the couple lived happily until Bright Eyes' death on May 26, 1903. Her epitaph states: "She did all that she could to make the world happier and better."

110. T. TIBBLES, *supra* note 27, at 295.

This article has isolated for discussion the relationship of Ponca history, part of which was the case of *Standing Bear v. Crook*, and the efforts of the

Every historical episode, no matter how trivial in isolation, is

Chief, Tibbles, and Bright Eyes to encourage passage of the Dawes Act. This is not the complete story of the Dawes Act's passage, of course. The full story has been well related and documented in two excellent works. See L. PRIEST, *supra* note 108; R. MARDOCK, *supra* note 104. The general excellence of Mardock's book remains despite the fact that he erroneously gives Wendell Phillips, and not Tibbles, credit for writing THE PONCA CHIEFS. See R. MARDOCK, *supra* note 104, at 179, 240. Bright Eyes wrote an introduction, Wendell Phillips, a dedication, and the book was originally published in 1880 under a pseudonym (Zylyff), but Tibbles was its author.

No attempt is made in this article to discuss the subsequent history of the allotment policy. Suffice to say that although it may have served to prevent Washington policy makers from moving tribes here and there at "whim," it did not provide answers to all Indian problems. There is evidence that wiser heads in the late 1880s warned that the Dawes Act would not solve them all. See, e.g., L. PRIEST, *supra* note 108, at 248-52. Professor Thayer warned that much remained to be done. See Thayer, *The Dawes Bill and the Indians*, 61 ATLANTIC MONTHLY 315 (1888). By 1911, Alice Fletcher, whose efforts were instrumental in obtaining an allotment law for the Omaha Tribe, was troubled. See 2 A. FLETCHER & F. LA FLESCHÉ, *supra* note 3, at 636-42. Tibbles coupled his plea for allotments with bringing "the Indians as persons under the protection of the courts." T. TIBBLES, *supra* note 27, at 208-09. Obviously Tibbles borrowed this idea from the case of *Standing Bear v. Crook*, but it was only another way to prevent Washington from moving Indian tribes at will.

This article does not detail the history of United States citizenship for Indians. Indian citizenship was much discussed during this same period, and even today some think Judge Dundy's decision made Standing Bear and his followers citizens. It did not, as the Omaha Ponca Committee knew so well. By another case, originating in Omaha and brought by the same lawyers who represented Standing Bear's band in the habeas corpus case, the committee sought to establish that Indians were citizens of the United States, but the United States Supreme Court ruled they were not citizens by virtue of the Fourteenth Amendment. *Elk v. Wilkins*, 112 U.S. 94 (1884). Lamberton opposed Poppleton and Webster in the Supreme Court, and this time won. After his victory he wrote about the subject in a national law review. See Lamberton, *Indian Citizenship*, 20 AM. L. REV. 183 (1886).

Even after Judge Dundy's holding in the habeas corpus case, lawyers continued to debate whether an Indian was a "person." For example, in 1881 the author of a legal article stated: "An Indian is not a person *within the meaning of the Constitution*." Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21, 28 (1881) (emphasis added).

Whether an Indian was a "person" was understood differently by lawyers and laymen, including such Indians as Standing Bear. Laymen thought the question asked whether an Indian possessed human characteristics unconnected with his or her legal position. Thus Standing Bear argued that the same blood would flow from his arm as would flow from Dundy's arm. Others stated that if an Indian was "tickled" he would laugh the same as anyone else. Lawyers, on the other hand, did not deny these common consequences, but instead asked whether Indians, ticklish or not, were included within the protection of the laws and Constitution of the United States. Chief Justice Marshall's famous Cherokee decisions, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832), left Indians in a unique legal position (not independent, but domestic, dependent nations) and thus neither completely "in," nor yet completely "out" of United States law. At

part of a larger picture and may typify it. The Ponca history was closely tied to the enactment of a new and important federal Indian policy, the allotment law. Yet there are other, less obvious conclusions which may be extracted from the Ponca case to illustrate some general characteristics of federal Indian law in the nineteenth century.

Until 1871 many details of United States-Indian relationships were contained in treaties.¹¹¹ Difficulties in handling these details by the treaty process troubled courts and legislatures for decades after treaties were ratified. Many of these difficulties appeared in the Ponca history. One of the most common was the language barrier.

The fact that the two sides spoke different languages required the use of interpreters, who were often incompetent and at times dishonest. Indian Inspector Kemble told a Senate committee that few interpreters were "safe"; Reverend Samuel Hinman, a Santee Agency missionary who frequently served as an interpreter, informed the same committee that only one out of a hundred interpreters was good enough to prevent misunderstandings.¹¹² At this

the time of the Ponca crisis, legal minds often solved the perplexing legal status of Indians by placing them "in" if they had severed tribal relations and followed "civilized" habits, but fenced them "out" if they maintained the old tribal life style. Judge Dundy did exactly this.

Today the *theory* of Standing Bear's case should be an anathema to those persons, Indian and non-Indian, who seek to strengthen tribal power. *See, e.g.,* Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450a-450n (1976); Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (Supp. III 1979). The most critical statement which may be made about Judge Dundy's opinion is that it made Indians "persons," and thus free from the "whims" of Washington bureaucrats, *only if* they abandoned their tribe as an instrument for social, economic, and political advancement.

Judge Dundy's separation of Indians into two classes—those who maintain tribal status and those who do not—is not entirely absent from current Indian law. *See, e.g.,* *Morton v. Mancari*, 417 U.S. 535 (1974) (sustaining a federal preference for "tribal" Indians in the Indian service); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) (Indians not entitled to treaty fishing rights unless they maintain an organized tribal structure); *see also* F. COHEN, *supra* note 9, at 5, 573.

111. Using treaties as Indian policy-making devices was an inherited method. Before 1776 most European powers made treaties with the tribes. *See* F. COHEN, *supra* note 9, at 47. Article IX of the Articles of Confederation granted Congress "power of . . . managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated." M. JENSEN, *ARTICLES OF CONFEDERATION* 263, 268 (1970). Indian treaty making continued between 1776 and the ratification of the United States Constitution. These treaties appear in chronological order in 2 C. KAPPLER, *supra* note 10. After ratification, many treaties were made until the practice ceased in 1871.
112. SENATE REPORT, *supra* note 19, at 96 (testimony of E.C. Kemble), 336 (testimony of S.D. Hinman).

same Senate hearing Standing Bear was astounded to learn that in 1875 he had agreed to remove to the Indian Territory; he repudiated the paper which so stated, even though it bore his signature.¹¹³ Agent Carrier, who procured the agreement, was probably equally shocked to hear Standing Bear state he did not agree to the move. Bright Eyes explained that the Ponca language contained no word or expression to differentiate the Indian Territory (the area south of Kansas) from other land occupied by Indians, such as the Omaha Reservation.¹¹⁴ Thus Standing Bear might reasonably have thought the destination under discussion was somewhere other than that Carrier had in mind.

Anyone reading the English version of Section 2 of the 1858 Ponca treaty would clearly understand that it permitted the President to determine from time to time whether annuity payments (totalling \$285,000 over a thirty year period) might be made either in cash or in commodities. Apparently the Poncas understood the payments were to be cash only.¹¹⁵ The historical record contains no explanation of this misunderstanding.

The language barrier affected communications less formal than treaty drafts, but just as important to the deft handling of issues. Thus Kemble may have used English words which clearly informed any listener competent in that language that the Ponca must agree to surrender their Niobrara Reservation before he would conduct their leaders on a search for a new homeland, but the interpreter's words might not have conveyed that idea to the Poncas. Many of the Poncas testified that they did not understand that Kemble's words conditioned the search upon final abandonment of the old lands.

These instances of the language barrier interfering with the smooth handling of dealings with the Poncas demonstrate that language was an omnipresent hurdle and not an irritant confined to treaty-making. At the same time, one must recognize that a misunderstanding in a treaty harmed much more than the smooth flow of relationships because the Indians viewed a treaty as a bilateral agreement of the most solemn and sacred nature. Thus when a

113. *Id.* at 146 (testimony of A.J. Carrier), 156-57 (testimony of Susette La Flesche for Standing Bear).

114. *Id.* at 160 (testimony of Susette La Flesche).

115. *Id.* at 264 (testimony of A.J. Pollock). Indian Inspector Pollock testified that "conditions" attached to promises or "alternative promises" were not readily understood by Indians. *Id.*

Indians were not accustomed to making decisions which would not take effect until a time far into the future. They compressed the time between making a decision and implementing it much more than did non-Indians. Thus they found little need for conditional promises or alternatives and paid scant attention to such devices when they were used by others.

tribe's treaty expectations were intertwined with a language problem, a failure to communicate was very damaging.

Courts have developed some rules for alleviating much of the harm flowing from misunderstandings. Thus "black letter" law informs us that ambiguous expressions are to be resolved in favor of the Indian parties concerned, treaties are to be construed as Indians themselves would understand them, and Indian treaties must be construed liberally in favor of the Indians.¹¹⁶

A second major impediment to harmonious white-Indian relationships was the failure of each side to understand fully the governmental processes of the other. Indians often thought a treaty was effective the moment it was signed. They acted in ignorance of the Senate's role in treaty-making, or thought Senatorial consent was a formality certain to occur. For example, as soon as the Poncas signed the 1858 treaty, they abandoned the lands they agreed to vacate and moved to the small area reserved for them as a reservation. However, the Senate acted more slowly and none of the United States' promises, including promised annuities, could be implemented until the Senate acted. The lengthy delay worried the Poncas, not only because the tardy annuities were sorely needed, but also because the long delay raised doubts about the integrity and good faith of the United States.

As another example, when General Crook's Commission visited the Southern Poncas to question them about their desire to remain there, the principal Chief, White Eagle, could not understand why the issue was not settled. The Chief explained that the question had been fully discussed by the tribe for a month or more and thereafter the tribal leaders had traveled to Washington and signed a paper to settle the matter on the terms the tribe had decided. Today, anyone reading the Chief's words senses his feeling of disgust that the Commission was investigating a matter he considered closed. The Chief, however, failed to realize that the issue of what to do with Standing Bear's contingent in the north had not been discussed or settled. Nor did Chief White Eagle realize that the President needed to proceed cautiously because the entire Ponca matter was a political hotbed of agitation on the national scene and Standing Bear's group had great support, even in the Senate.

At several points in the Ponca story, it is evident that whites did not understand the tribal method of decision-making. The Crook

116. See *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972), where the court construed the English treaty words "right to hunt" to include the right to fish because the Indian language did not distinguish hunting from fishing, but employed a general term (in English meaning "to obtain wild food") to refer to both hunting and fishing.

Commission heard Chief White Eagle and Chief Standing Bear report the wishes of their respective followings concerning a permanent location, yet proceeded to interrogate every individual Indian who attended any meeting about whether he, or she, was of the same mind as the chief. Although both chiefs told the Commission *all* were of the same mind, the Commission seemed bent upon checking the accuracy of each chief's statements. One wonders how the chiefs viewed this process of checking the truth of their reports of tribal unanimity. If Indians are faulted for failing to understand that the Senate's consent was needed to vitalize a treaty, whites are equally blameworthy for failing to realize that a chief spoke for his people and that additional consent from them was *not* needed.

Many histories of white-Indian relationships contain accounts of trips by Indian leaders to Washington, which often included direct contact with the President. Often these accounts, expressly or subtly, convey the impression that the trips were a stratagem to impress the Indian visitors with the power of the United States and the superiority of its culture and institutions. This picture is not entirely false, but it omits an important facet of Indian culture: Indian leaders did not approve of negotiating with subordinates in the federal bureaucracy. To ask Indian leaders to confer with subordinates was undignified and a "put down," in the current vernacular. This attitude attached to negotiations with other tribes as well as with the federal government.

The Ponca history is dotted with instances of negotiations at both high and low levels of the federal hierarchy. For example when the Poncas were unhappy with their new home on the Quappaw Reservation, they obtained the President's permission to move to other land and seemed pleased with this mode of proceeding. Although their agent, for an unexplained reason, attempted to delay their relocation, they moved anyway, no doubt made bold by their direct dealings with the President. The Crook Commission obtained status through its direct appointment by the President. The Commission was careful to point out, however, that the President would not make the final decision but would submit a recommendation to Congress for approval. This reminder was necessary because Indians were not accustomed to dealing with an entity where decision-making was ruled by a political philosophy of power separation.

The Ponca history reveals instances where the President might have aided greatly had he shown more interest in the problem. One wonders if Kemble and his Washington superiors in the Indian Office did not err at several points by failing to take a delegation of Ponca leaders to meet with the President. For example,

when the eight chiefs became discouraged on their inspection trip, and again when the bulk of the tribe refused to pack up and cross the Niobrara, a visit with the President might have altered history. The failure of the President to answer the telegram sent from Sloan, Iowa, by the Ponca chiefs who left the inspection trip was not only bad manners, but also a failure to act when action might have prevented the later need for force to accomplish removal. Reverend Riggs, a Santee missionary, told a Senate committee that had the President ordered the Poncas to go to the Indian Territory, they would have obeyed, even if the bulk of them personally did not want to go.¹¹⁷ Chief White Eagle's testimony before the same committee was in accord with Riggs' assessment.¹¹⁸

The handling of the Ponca case was often characterized by bad or unwise decisions stemming from ignorance or arrogance. Secretary Schurz admitted he was not very experienced in Indian affairs when he became Secretary of the Interior. After the Ponca removal was accomplished, he admitted it was a mistake and stated had he the power to do it over, he would not let it occur. One wonders why no one in Washington suggested negotiating with the Sioux to reacquire the small Ponca Niobrara Reservation.¹¹⁹ The failure of the United States to provide adequate food and shelter for the Poncas after removal approached criminal neglect; previous removal experiences with other tribes, such as the Pawnees, had forewarned that health problems might occur. Additionally, Kemble explicitly warned Washington what would happen if shelter, food, and medical aid were not provided.

Federal Indian policy in the nineteenth century was not sharply defined, nor fairly administered. The Ponca removal was supported as implementation of a general policy to relocate *all* Indian tribes in one section of the country, when, in fact, that policy was neither clearly articulated nor universally followed. Although the Sioux were nearly removed,¹²⁰ they were not, partly because they were such a large tribe. Several persons close to the Ponca case observed that small, weak, and peaceful tribes received worse treatment than larger, more powerful, and certainly more hostile tribes. While the Poncas were starving, wagon loads of supplies for the far more hostile Sioux were delivered. The Poncas ob-

117. See SENATE REPORT, *supra* note 19, at 174 (testimony of Alfred S. Riggs).

118. *Id.* at 194 (testimony of White Eagle).

119. The United States found ways to negotiate with the Sioux to diminish the size of the Great Sioux Reservation, which was demanded by whites, but seemed unable to do the same to aid the Poncas. No great difficulty would have been encountered had the Ponca land mix-ups been part of the negotiations concerned with larger land cessions. I have not discovered any evidence that anyone ever suggested this possibility.

120. See G. HYDE, *supra* note 14, at 259.

served this, as did many whites interested in justice for the Poncas.

Federal policy was often haphazard. The most glaring example was the inclusion of the Ponca lands in the great Sioux Reservation. Another example occurred when the Poncas were relocated on the Quapaw Reservation in that no legal foundation for their presence (temporary or permanent) had been arranged; the same was true for many months after they had moved to a new area in the Indian Territory. Whether they were owners, tenants, possessors, or trespassers had not been considered, nor had the boundaries of their land been settled. This uncertainty disturbed them greatly. Federal policy dictated that they should give up the hunt and become farmers. The Poncas agreed with that role. However, successful farming required tillers of the soil to make permanent improvements and to be assured of a durable relationship with the land. This permanency was sadly lacking during much of the Ponca history. The need for some definite and unchangeable relationship to the land caused many tribes, including the Ponca and the Omaha, to see great value in the allotment principle.

Federal Indian policy lacked orderliness—too often the timing of one action was pressured by the timing of another. This is demonstrated best by the relationship between the Ponca removal and the selection of Missouri River points for Sioux ration distributions. The Sioux made clear they did not want to go to these points for ration distribution and remained there for just one season. Even then, the Brule Sioux, whom federal officials worried would come in hostile contact with the Ponca, defiantly remained some distance from the Missouri for most of the distribution period. Kemble was pressured by the rapidly approaching date of the Sioux arrival. This time squeeze left him insufficient time to negotiate, so he resorted to force to remove the Poncas. The pace of these events certainly was much faster than Indians employed when important decisions were at hand. At least one knowledgeable observer thought the Poncas' slowness in preparing to move south indicated a desire for a tribal meeting to discuss the issues, and that after a council they would have moved, but the hard-pressed and exasperated Kemble saw it as complete and final defiance. Which person's judgment was correct cannot now be settled, but, as a general proposition, the deliberateness with which decisions were made in Indian circles in the nineteenth century always annoyed whites, who were impatient with slowness when there was a large wilderness to subdue.

The Ponca history and Standing Bear's case were indeed a microcosm of federal Indian policy in the nineteenth century. In this

swirl of events Standing Bear is the central and commanding actor. Of course he was aided by a good supporting cast:

—Tibbles with his enthusiasm for the cause of human rights, his skills in using the press as an instrument to marshal public opinion, and his simple but moving speeches to eastern audiences;

—the unselfish and untiring efforts of two willing and able leaders of the Nebraska bar, Webster and Poppleton;

—the devotion of Bright Eyes;

—the courage of Judge Elmer Dundy;

—the research and writing of Helen Hunt Jackson (even if *Century of Dishonor* is "propaganda");

—the charity of Bishop Clarkson and the Omaha Ponca Committee;

—the support of the Boston literary figures and politicians who flocked to the noble cause of righting a wrong done to a few persons who were helpless to help themselves.

The drama would not have unfolded as it did without their services. Yet they would have had no part in an intense, human drama if Standing Bear had not taken the road northward from Indian Territory on a journey which eventually led to the judicial declaration that he was a person and was entitled to a measure of protection from the courts. Standing Bear's nobility, eloquence, courage, devotion to the welfare of his band, and, above all, his discovery of the superiority of reason over force as the better way merit him the honor of membership in the Nebraska Hall of Fame.