

Pine Ridge, Whiteclay and Indian Liquor Law

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The Origins of Pine Ridge and Whiteclay

As the United States expanded Westward following the Louisiana Purchase and encountered new native tribes, the government's efforts to control the Indians followed the same pattern of attempted subjugation and broken treaties as with its earlier Indian encounters in the East. In some of the first American contact with the Western Sioux, the tribes were identified as a threat to United States commercial interests on the Missouri River.¹ Meriwether Lewis journaled that "Unless [the Sioux] are reduced to order by coercive measures, I am ready to pronounce that the citizens of the United States can never enjoy but partially the advantages which the Missouri presents."² But while the United States may have had the desire to subjugate the Sioux, they did not yet have the military power to do so.³ In fact, coercion was not initially necessary; by 1838, American interactions with the Sioux found the natives to be friendly to the whites and respectful of American government.⁴ But increased tribal interaction with Americans brought newfound trade with the whites, and inter-tribal warfare intensified as tribes fought for valuable but overhunted buffalo and game.⁵ Warfare, smallpox and diminishing resources weakened the great Sioux tribes.⁶ From 1685 until the mid 19th Century the Western Sioux tribes controlled an area stretching from the Minnesota River in the East to the

¹ JOHN R. WUNDER, *NATIVE AMERICAN LAW AND COLONIALISM BEFORE 1776 TO 1903* 176 (GARLAND PUBLISHING, INC. 1996).

² *id.* at 176-77.

³ *id.*

⁴ *id.* at 178.

⁵ *id.* at 190.

⁶ *id.*

head of the Yellowstone River in the West, then South to the upper drainage of the Republican River.⁷ By means of a series of treaties concluding with the 1889 Indian Appropriations Act, the once vast Western Sioux empire was reduced to six tribal reservations in what is now South Dakota.⁸ The Oglala Sioux tribe was the first to receive its own reservation in the 1889 Act.⁹ The Act created the Pine Ridge Agency, located entirely within the borders of the Territory of Dakota (South Dakota today), save for a fifty square mile extension into the State of Nebraska,¹⁰ reserved by executive order for “only so long as it may be needed for the use and protection of the Indians receiving rations and annuities at the Pine Ridge Agency.”¹¹ In 1904, President Theodore Roosevelt ceded this extension back to the State of Nebraska in a pair of executive orders.¹²¹³ The Pine Ridge reservation is now home to approximately 28,000 members of the Oglala Sioux tribe,¹⁴ disbursed across 70,000 square miles¹⁵ of inhospitable rural country. Just across the Pine Ridge Agency border, on the land ceded back to Nebraska in Roosevelt’s 1904 executive orders, stands unincorporated Whiteclay, Nebraska.

⁷ *id.* at 171.

⁸ ACT OF MARCH 2, 1889. 25 STAT. 888.

⁹ *id.* at Sec. 1.

¹⁰ *id.*

¹¹ *id.*

¹² John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. available at <http://www.presidency.ucsb.edu/ws/?pid=69484>. (Last visited December 13, 2010).

¹³ John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. available at <http://www.presidency.ucsb.edu/ws/?pid=69488>. (Last visited December 13, 2010)

¹⁴ OGLALA SIOUX TRIBE PINE RIDGE INDIAN RESERVATION, http://www.oglalalakovation.org/About_the_Tribe_files/History%20of%20Oglala%20Sioux%20Tribe.pdf (last visited December 11, 2010).

¹⁵ *id.*

Federal Indian Prohibition

Through a series of congressional acts beginning in 1790 and continuing through 1887, the United States government comprehensively addressed the subject of Indian commerce.¹⁶ During this era, the United States determined that one of its core tenants of Indian commerce policy would be to control liquor traffic into Indian Country.¹⁷ The Act of March 30, 1802 vested authority in the President of the United States to “take such measures...to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes.”¹⁸ However, federal restrictions on liquor trade with the Indians extended only to territories under Federal jurisdiction, and not to the States.¹⁹ This prompted President Thomas Jefferson to seek assistance from the States in prohibiting their citizens from selling Liquor to the Indians from outside the borders of Indian Country. Jefferson wrote:

“Latterly the Indians have got into the practice of purchasing such liquors themselves in the neighboring settlements of whites, and of carrying them into their towns and that in this way our regulations so salutary to them are now defeated... It is much desired that [the states] should pass effectual laws to restrain

¹⁶ CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 22-24 (HARDY MYERS ED., 3RD ED. 2000).

¹⁷ DAVID H. GETCHES ET. AL., FEDERAL INDIAN LAW 89 (THOMSON WEST, 5TH ED. 2005).

¹⁸ ACT OF MARCH 30, 1802, 2 STAT 139 AT 146.

¹⁹ FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 24 (UNIVERSITY OF NEBRASKA PRESS, 3RD ED. 2000).

their citizens from vending and distributing spirituous liquors to the Indians.”²⁰

Federal Indian liquor control was fortified when the Act of June 30, 1834 made it a federal offense for any person to provide any Indian in Indian Country with liquor, to transport liquor into Indian Country (with the exception of liquor introduced for the use of stationed U.S. troops),²¹ or to set up a distillery in Indian Country.²² The Act further authorized the seizure and destruction of any liquor found within Indian Country²³ and authorized action by the United States military to seize and destroy illegal distilleries.²⁴ The 1834 Act contained only financial penalties for violations.²⁵ Providing an Indian with liquor subjected the violator to a \$500 fine, transportation of liquor into Indian country notwithstanding the military exception was a \$300 offense and a distillery ownership and operation violation carried a \$1,000 fine.²⁶ In 1847 Congress enhanced the penalties for violations to include the possibility of up to two years imprisonment.²⁷ The 1847 Act also prohibited the distribution of Federal annuity monies to any Indian who was under the influence of liquor or who had ready access to liquor, and required the chiefs of any tribe

²⁰ *id.*

²¹ ACT OF JUNE 30, 1834, 4 STAT 729.

²² *id.* at 732-733.

²³ *id.* at 732.

²⁴ *id.* at 733.

²⁵ *id.*

²⁶ *id.*

²⁷ ACT OF MARCH 3, 1847, 9 STAT 203, SEC. 2.

that was a party to a Federal contract to pledge to work to prevent the introduction of liquor into their country before the United States would make any contract payments.²⁸ 101 years later in 1948, Indian prohibition was codified in Title 18 of the United States Code, with statutory language devoted to the definition of Indian Country,²⁹ dispensing intoxicants within Indian Country,³⁰ possessing intoxicants in Indian Country³¹ and to evidentiary and seizure rules pursuant to violations of these provisions.³²

Federal Repeal of Prohibition and the Oglala Response

But within five years of the Title 18 codifications, some legislators began to consider Indian prohibition as discriminatory.³³ Legislation was introduced to allow the State of Arizona to amend its constitution to remove the prohibitions on the sale of liquor to Indians and the introduction of liquor into Indian Country.³⁴ But by the time it had passed, the revised bill applied to all States.³⁵

Public Law 277 in 1953, codified as 18 U.S.C. § 1161 reversed 150 years of strict Indian prohibition in favor of a scheme that permitted the Tribes to regulate liquor on

²⁸ *id.* at Sec 3.

²⁹ 18 USC 1151 (2006).

³⁰ 18 USC 1154 (2006).

³¹ 18 USC 1156 (2006).

³² 18 USC 3113 (2006), 18 USC 3488 (2006), 18 USC 3669 (2006).

³³ *Rice v. Rehner*, 463 U.S. 713, 726, (1983).

³⁴ *id.* at 727.

³⁵ *id.*

their own reservations so long as it was done in accordance with the laws of the state.³⁶ The new law repealed all of the previously enacted prohibitions on transacting liquor business “provided that such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country.”³⁷ In other words, unless a tribe specifically legalized liquor on its reservation, the federal prohibitions remained in force. Tribes across the country took notice immediately. Within the first 18 months of passage, 22 tribes had legalized alcohol on their reservations; by the end of 1974, that number had increased to 115.³⁸ In 1969³⁹ and 1970⁴⁰ the Oglala Sioux Tribal Council legalized the possession and sale of alcohol on the Pine Ridge Reservation but due to dissent from three traditional district councils, the legalization was almost immediately repealed.⁴¹ Prohibition remains in effect on Pine Ridge today by Tribal Ordinance⁴² and consequentially by the Federal Prohibition still in effect under Title 18 of the United States Code. Pine Ridge is in the minority of reservations for continuing to completely

³⁶ Act to Eliminate Certain Discriminatory Legislation Against Indians in the United States, Pub. L. No. 83-277, 67 Stat. 586.

³⁷ 18 USC § 1161 (2006).

³⁸ Phillip May, *Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes*, 5 AM. INDIAN. LAW. R. 217 (1977).

³⁹ Pine Ride Reservation, S. Dak. Ordinance Legalizing Introduction, Sale or Possession of Intoxicants, 34 Fed. Reg. 3701 (Mar. 1, 1969).

⁴⁰ Pine Ride Reservation, S. Dak. Ordinance Legalizing Introduction, Sale or Possession of Intoxicants, 35 Fed. Reg. 9219 (June 12, 1970).

⁴¹ May, *supra* note 38, at 222.

⁴² Oglala Sioux Tribe Criminal Offenses Code, <http://www.narf.org/nill/Codes/oglalacode/oglatoc.htm> (last visited November 22, 2010).

prohibit alcohol on its reservation; as of the most recent available survey of federally recognized tribes in the lower 48 states, 63% (212 of 334) had legalized alcohol to some degree.⁴³

Whiteclay Flouts Nebraska and Oglala Law

Pine Ridge law is clear in its prohibition of alcohol. The Oglala Sioux Tribe Criminal Offenses Code makes it a crime to manufacture⁴⁴, transport⁴⁵, sell⁴⁶ or possess⁴⁷ alcohol on Pine Ridge, and even authorizes penalties for the condition of being intoxicated whether in public or in private anywhere within the confines of the Pine Ridge Reservation.⁴⁸ But in 2008, the four Nebraska liquor stores that stand just outside of Pine Ridge jurisdiction in Whiteclay sold over 4.2 million cans of beer.⁴⁹ Whiteclay stands within a census-designated place known as Pine Ridge, Nebraska, population 14.⁵⁰ The beer consumers are almost entirely composed of Oglala Sioux who walk or drive into

⁴³ Anne E. Kovas, Et. Al., *Survey of American Indian Alcohol Statutes, 1975-2006: Evolving Needs and Future Opportunities for Tribal Health*, J. STUD. ALCOHOL DRUGS 69, 183-191, 2008.

⁴⁴ Oglala Criminal Code, *supra* note 42, at § 537.

⁴⁵ *id.*

⁴⁶ Oglala Criminal Code, *supra* note 42, at § 538.

⁴⁷ *id.*

⁴⁸ Oglala Criminal Code, *supra* note 42, at § 536.

⁴⁹ Nebraska Liquor Control Commission, *Gallonage Consumption Whiteclay*, <http://www.lcc.ne.gov/Revenue%20Docs/2008%20Whiteclay%20Year%20End%20Stats.pdf> (last visited December 11, 2010).

⁵⁰ United States Census Bureau Population Finder, *Pine Ridge CDP, Nebraska*, http://factfinder.census.gov/servlet/SAFFPopulation?_event=Search&geo_id=01000US&_geoContext=&_street=&_county=pine+ridge&_cityTown=pine+ridge&_state=04000US31&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=population_0&ds_name=null&_ci_nbr=null&q_r_name=null®=null%3Anull&_keyword=&_industry= (last visited December 11, 2010).

Nebraska to purchase and consume beer. Whiteclay's liquor stores are licensed only to sell beer for off-premises consumption.⁵¹ But with alcohol completely banned on Pine Ridge and no legal place to consume the beer in Whiteclay, the result is daily illegal consumption and the perpetuation in Nebraska of an alcohol problem that Sioux leaders have passed laws to prevent.

Alcohol abuse among the Indian tribes is the leading reason that Indians have five times the rate of fatal liver disease and cirrhosis as other ethnic groups in the United States and that alcohol related ailments are 60% greater in Indian Health Service hospitals than what is seen in average United States hospitals.⁵² Despite both federal and tribal prohibition on the reservation, Pine Ridge has one of the highest rates of alcoholism in the entire United States.⁵³ There is no identifiable business purpose for 4 liquor stores in Whiteclay other than to capitalize on a jurisdictional limitation that prevents the Oglala from enforcing its liquor laws on its members once they step off the reservation to drink in Nebraska. Although the Nebraska legislature has heard the concerns of the Oglala, and the tribe has found some political allies within the state government, Nebraska has done little to truly address the Whiteclay problem. The little effort that has been made in Nebraska is ineffective or goes nowhere. In 2002, State Senator Donald G. Priester introduced Legislative Bill 1306, a law that would have honored the original intent of

⁵¹ A licensee search shows that the four beer vendors in Whiteclay have Class-B licenses, allowing sale for off-premises consumption only. Nebraska Liquor Control Commission, *Licensee Search*, http://www.lcc.ne.gov/license_search/licsearch.cgi (last visited December 11, 2010).

⁵² Kovas, *supra* note 43, at 183.

⁵³ Oral testimony of John Yellow Bird Steele at 9:45, Senate Committee on Indian Affairs, *available at* http://indian.senate.gov/public/_files/Steele032207.pdf.

President Arthur when his executive order first carved out the Nebraska extension in 1882. The intent of the bill was to do something to put an end to Nebraska's contribution to the Pine Ridge alcohol problem by prohibiting the issuance of any new liquor licenses within the original Nebraska extension area, or within 5 miles of Indian Country in which the tribal council has banned the sale and consumption of alcohol.⁵⁴ ⁵⁵ The bill would have grandfathered the existing liquor licenses, so no current business owners would have been hurt.⁵⁶ Additionally, the legislative fiscal analysis of the bill found that there would be no impact on state or local revenues or expenditures.⁵⁷ But LB 1306 did not make it out of committee, nor did Senator Priester's virtually identical proposed legislation in 2003.⁵⁸ In 2005, State Senator Ray Jannsen introduced legislation intended to address the issuance of multiple liquor licenses in areas where there was an 'over-saturation of such licenses.'⁵⁹ Legislative Bill 530 would have modified Neb. Rev. Stat. § 53-132(2) to allow the Nebraska liquor control commission to have some discretion in whether to issue a new liquor license, changing the language from 'shall be issued' to 'may be issued' after a series of conditions were met.⁶⁰ The bill was stalled in committee in 2005, but in 2006 a more narrowly tailored revision to the statute was drafted and

⁵⁴ L.B. 1306, 97th Leg., 2d Sess. (Neb. 2002).

⁵⁵ *id.* at lines 13-17.

⁵⁶ *id.*

⁵⁷ *id.*

⁵⁸ L.B. 426, 98th Leg., 1st Sess. (Neb. 2003).

⁵⁹ L.B. 530, 99th Leg., 1st Sess. (Neb. 2005).

⁶⁰ *id.*

ultimately passed into law.⁶¹ The change to Neb. Rev. Stat. § 53-132 may be useful to prevent additional alcohol vendors from getting into the Whiteclay area, but it fails to address the fact that there is no place for Pine Ridge residents to legally consume the beer once they get to Whiteclay. In 2009, Sheridan County had the highest arrest rate per 1000 people in the entire state of Nebraska.⁶² Nearly 60% of those arrests were of Indians, with the alcohol-related offenses (DUI, alcohol violations, simple assault) comprising over half of the arrests.⁶³ A cross-deputization agreement between the State of Nebraska and the Oglala Tribal Police that would enhance law enforcement efforts in Whiteclay has never been implemented. Much of the alcohol related crime continues to go on with the laws unenforced. In response to the continued failure to regulate alcohol in Whiteclay, State Senator LeRoy Louden introduced legislation in January of 2010 that would earmark alcohol sales tax revenue within a 30-mile radius of Whiteclay for economic development, health care and law enforcement. The bill as introduced would have permitted any political subdivision within a 30 mile radius of a census designated place to apply for funding for economic, healthcare or law enforcement assistance from the state's alcohol sales tax pool.⁶⁴ But revenue commission hearings in February of 2010 again pushed the alcohol issue off the table, and the first amended bill stripped any mention of

⁶¹ LB 845, 99th Leg., 2d. Sess. (Neb. 2006).

⁶² Nebraska Commission on Law Enforcement and Criminal Justice, *Arrest and Offense Rates County Map*, <http://www.ncc.ne.gov/statistics/mapping/necomap.htm> (last visited December 11, 2010).

⁶³ Nebraska Commission on Law Enforcement and Criminal Justice, *Arrest Data Query Results: Race vs. Offense, Year: 2009, County: Sheridan, Age: Adult*, http://www.ncc.state.ne.us/statistics/data_search/arrest/arrest_crosstab.phtml (last visited December 11, 2010).

⁶⁴ L.B. 1002 Introduced Copy, 101st Leg., 2d. Sess. (Neb. Jan. 20, 2010).

alcohol tax revenue from the legislation, resulting in a law that amounts to little more than establishing a general assistance fund for Whiteclay and any other area like it.⁶⁵ The final bill set aside \$25,000 from the State's general fund to be used by census designated communities in Nebraska, within 30 miles of Indian reservation land, for economic health care and law enforcement purposes.⁶⁶ Governor Dave Heineman signed the amended bill into law on April 14, 2010⁶⁷ but its provisions are set to expire in 2018.⁶⁸ Although making funding available for improvement in areas like Whiteclay is a step in the right direction, Nebraska's leaders proved again that they are unwilling to address the State's contribution to the destruction of the people of Pine Ridge.

Proposed Solutions

With Nebraska's government unwilling to act to counter the harm that the Oglala Sioux suffer on account of Whiteclay, the tribe has no choice but to act on its own to find a remedy.

Federal Healthcare Intervention

The Sioux could attempt to solve their alcohol issue by pushing for Federal intervention on the reservation itself. Congress has found that the relationship between

⁶⁵ L.B. 1002 Revenue Committee Hearing, 101st Leg., 2d. Sess. (Neb. Feb. 3, 2010).

⁶⁶ L.B. 1002 Final Reading Copy, 101st Leg. 2d. Sess. (Neb. 2010)

⁶⁷ L.B. 1002 Slip Law Copy, 101st Leg. 2d. Sess. (Neb. 2010)

⁶⁸ *id.* at sec. 7.

the United States and the Indian tribes requires federal efforts to maintain and improve the health of Indians.⁶⁹ Members of federally recognized Indian tribes are entitled to receive health services through Indian Health Service (IHS).⁷⁰ Realizing that substance abuse problems are rampant in Indian communities, Congress added Substance Abuse Programs to the services provided by IHS in 1986.⁷¹ But as with many federal entitlement programs, funding is insufficient to address all of the need in the communities being served. However for Pine Ridge, there is hope that money will soon be available. The 2009 Recovery Act provided \$590 million in funding for the construction of health care facilities nationwide, and the 2010 fiscal year IHS budget was increased by 13%, the largest boost since 1990.⁷² But a detoxification facility on Pine Ridge will cost nearly \$1.4 million to construct⁷³ and IHS funding regulations require that 70% of the dollars received go to the improvement of *existing* facilities.⁷⁴ To date, Pine Ridge has not received the level of funding that would allow the necessary facility to be built. In addition, treatment centers would help only those who wish to be helped, and would do little to curb the illegal flow of alcohol onto the reservation from Whiteclay, whether still packaged or in the form of alcohol ingested by Pine Ridge residents in Nebraska before coming home. Healthcare improvements would certainly help those residents of Pine

⁶⁹ FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1375 (LEXISNEXIS, 5TH ED. 2005).

⁷⁰ *id.* at 1379.

⁷¹ 25 U.S.C. §1665 (2006).

⁷² Oral Statement of IHS Director Yvette Roubideaux on October 8, 2010, *available at*, http://www.ihs.gov/publicinfo/publicaffairs/director/2010_Statements/Oglala_Sioux_Oct_8_2010.pdf

⁷³ L.B. 1070, *supra* at note 65, at 28

⁷⁴ *id.*

Ridge who find their way into the treatment facilities, but healthcare cannot address the root problem, which is the sale of alcohol in Whiteclay.

Re-Annex Whiteclay to Pine Ridge

Whiteclay opponents have suggested that the sitting President should simply reverse the 1904 Executive Order that removed the Nebraska extension from the Pine Ridge reservation in the first place. Former South Dakota Senator James Abourezk made one such call to action in a July 15, 2009 plea to President Obama that was published in the New York Times.⁷⁵ The argument in favor of having the President overturn the 1904 order has included the notion that Roosevelt never had the authority to place the land back into the territory of Nebraska in the first place,⁷⁶ however this argument is frail. The language of the Treaty of 1889 specifically reserves the land in the State of Nebraska ‘by executive order’ and for ‘only so long as it may be needed for the use and protection’ of the Indians at Pine Ridge.⁷⁷ A legal challenge to Roosevelt’s 1904 order faces substantial hurdles. First, the tract of land was added by executive order and executive orders are subject to reversal by subsequent executives. Secondly, the treaty language clearly indicates that the Nebraska Extension is severable from the reservation on a future date. Roosevelt’s actions were most likely legal. But thirdly, even if they were not, in order to

⁷⁵ James Abourezk, Evil Spirits, N.Y. TIMES, July 15, 2009, <http://www.nytimes.com/2009/07/16/opinion/16abourezk.html>

⁷⁶ *id.*

⁷⁷ Act of 1889, *supra* at note 8.

file any lawsuit, the government would have to waive its sovereign immunity,⁷⁸ and then even if it did, private civil action is not available to enforce an executive order.⁷⁹

Indeed, though, the sitting President does have the authority to reverse a predecessor's order. Would Barack Obama be amenable to reversing the 1904 order? The problem with this proposition is that the courts would most likely interpret a reversal of the executive order as a taking⁸⁰, forcing the federal government to compensate the white landowners in the buffer zone. And in the event that the President did actually reverse the 1904 order, the liquor stores would surely relocate to some area similarly situated just outside the reservation boundary.

Enforce the 'Bad Men' Clause

If re-annexation is not the solution, perhaps the Oglala could successfully enjoin the liquor stores in Whiteclay from selling to members of the Oglala tribe by invoking the police powers of the United States. The 'Bad men' clause of the Treaty of 1868⁸¹ reads as follows:

⁷⁸ *Poor Bear v. Nesbitt*, 300 F. Supp.2d 904 (2004). This is primarily a hurdle if a petitioner wishes to sue the State of Nebraska for compensation for an unjust taking; the Tucker Act waives the government's sovereign immunity for constitutional claims such as a taking.

⁷⁹ *In re: Surface Mineral Regulation Litigation*, 627 F.2d 1346, (D.C. Cir. 1980)

⁸⁰ *Abourezk*, *supra* note 75. *Abourezk* had also petitioned the Bush administration to reverse the 1904 order, and Attorney General Alberto Gonzales returned an opinion letter indicating that such action would amount to a taking.

⁸¹ Act of 1889, *supra* at note 8, at Sec. 19. The treaty of 1868 was fully incorporated into the Treaty of 1889 that established Pine Ridge so long as no conflict existed between the two treaties.

“If *bad men among the whites*, or among other people subject to the authority of the United States, shall commit *any wrong upon the person or property of the Indians*, the United States will, upon proof made to the agent and forwarded to the commissioner of Indian affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.⁸²” [Emphasis added]

Following the tenants of Indian treaty construction, the courts would be required to interpret the ‘bad men’ clause as the Indians would have understood it and “in a spirit which generously recognizes the full obligation of [the United States] to protect the interests of a dependent people.”⁸³ Indian treaties are to be interpreted liberally in favor of the Indians with any ambiguities resolved in their favor.⁸⁴ In its most common use, the ‘bad men’ clause has been reviewed to determine the scope of Federal jurisdiction in criminal cases in Indian country.⁸⁵ However, a 2009 Federal Claims Court decision interpreting the clause may have opened the door for claims based on damages caused by Whiteclay liquor sales.⁸⁶ In *Elk v. United States* an Oglala woman who was sexually

⁸² *id.*

⁸³ *Chocotaw Nation of Indians v. U.S.*, 318 U.S. 423 at 342 (1943).

⁸⁴ *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172, 200 (1999)

⁸⁵ See *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, U.S. (1883) and its progeny.

⁸⁶ *Elk v. United States*, 87 Fed.Cl 70 (2009)

assaulted by a white Army recruiter was awarded damages for her injuries. In order to recover under the 1868 Treaty, it must be shown that “bad men among the whites” committed a “wrong upon the person or property of the Indians” and the plaintiff must also show the amount needed to “reimburse” her for the “loss sustained.”⁸⁷ There the court held that the term ‘reimburse’ includes not only compensation for out of pocket damages already suffered, but also for pain, suffering and mental anguish⁸⁸ – essential damages for an Indian seeking recovery from the Whiteclay beer vendors because so many of the Oglala who suffer from alcoholism come from poverty and have few concrete economic losses to speak of. The burden of proving damages lies with the plaintiffs,⁸⁹ but a mathematically exact figure is not required – it is enough that the evidence enables the court to make a fair and reasonable approximation.⁹⁰ According to the court, it was foreseeable that the United States would be held liable for *any wrong* committed upon the Indians by the whites, and from a historical evaluation of the United States prohibition of introducing liquor into Indian country or providing it to Indians by any means, the argument appears to be strong that the Whiteclay liquor stores are committing wrongs covered by the treaty. But *Elk* concerned damages from criminal conduct and it may be hard to convince a judge to make the leap from awarding damages arising out of criminal sexual assault to awarding them for damages arising out of the legal act of selling alcohol. And unless a suit is filed as a class action by all of the Oglala

⁸⁷ *id.* at 78.

⁸⁸ *id.* at 82,83.

⁸⁹ *id.* at 89

⁹⁰ *id.*

Sioux injured by the sale of Whiteclay liquor, it is questionable whether the damages awarded on a case-by-case basis would be sufficient to put the liquor storeowners out of business. Finally, the treaty itself provides for damages, so injunctive relief to prevent alcohol sales is unavailable.⁹¹ Ultimately, despite the novelty of the argument that the ‘bad men’ clause addresses civil wrongs by whites against the Indians, prevailing in a suit based on this clause seems destined to be an uphill battle.

Legalization

Perhaps the most feasible solution to the Pine Ridge and Whiteclay conflict is for the tribe to reconsider its stance on prohibition and legalize the sale and consumption of alcohol on Tribal land. Jurisdictionally and economically this seems to be the most beneficial solution for the tribe, and although it does little to address the root ills of alcoholism among the Oglala,⁹² it reduces the need to police the illegal liquor related activity on the reservation and allows the tribe to redirect its resources toward prevention and treatment.

Legalization removes the jurisdictional hurdle that Oglala authorities currently face with Whiteclay across the South Dakota-Nebraska border, and puts liquor law enforcement squarely into the hands of the State of South Dakota and the tribe itself. Although the tribes are generally not subject to State laws within the boundaries of their

⁹¹ Generally, injunctive relief should be granted only if the injured party lacks a complete and adequate remedy at law. 42 Am.Jur 2d. Injunctions § 24 (Thomson Reuters 2010)

⁹² The deplorable socioeconomic conditions among the people of Pine Ridge that are beyond the scope of this essay.

reservations, PL 83-277 requires alcohol sales to be in conformity with both tribal ordinance and state laws.⁹³ This would give the tribal police and South Dakota law enforcement officials the authority to police alcohol-related offenses such as the sale to intoxicated persons or underage sale & consumption,⁹⁴ to establish licensing provisions for vendors,⁹⁵ and to regulate the time, locations and manners in which alcoholic beverages are sold.⁹⁶ This solution eliminates the jurisdictional impotence of the Tribal Police, who cannot enforce Tribal law in Whiteclay and who have chosen not to implement the cross-deputization agreement that would allow them to enter Whiteclay to enforce Nebraska alcohol law.

While the ability to regulate alcohol on its own land should be seen as a benefit to the Oglala Tribal Council, the more compelling argument for legalization on Pine Ridge is to keep Indian dollars in Indian country. Economic development on Pine Ridge is among the worst in the United States; Shannon County, South Dakota is the second poorest county in the country with 46% living below the poverty level as of 2008.⁹⁷ Nevertheless, in 2009 Whiteclay's four beer vendors sold nearly 200,000 cases of beer

⁹³ PL 83-277, *supra* at note 36.

⁹⁴ Regulated generally by S.D. Codified Laws § 35

⁹⁵ The right of a State to require Federally licensed Indian traders to hold a State issued liquor license was upheld in *Rice v. Rehner*, *supra* at note 33.

⁹⁶ S.D. Codified Laws § 35

⁹⁷ United States Census Bureau, Shannon County Quick Stats, *available at* <http://quickfacts.census.gov/qfd/states/46/46113.html> (last visited December 11, 2010).

and generated \$380,000 in combined Federal and State sales taxes.⁹⁸ With tribes exempted from collecting State taxes from members for sales of goods within the boundaries of the reservation⁹⁹ a legalized liquor trade could provide the tribe with its own product upon which to levee tribal taxes and generate much needed revenue to fund healthcare services on Pine Ridge. This solution could ease the burden imposed by IHS's funding regulations¹⁰⁰ that up until now have stalled the construction of a new detoxification facility on Pine Ridge. With proper taxation strategy, Pine Ridge could effectively price Whiteclay's liquor stores out of the marketplace and turn a social poison into an economic boon.

Despite the legal and economic benefits to be had, recent attempts to pass legalization ordinances on Pine Ridge have failed. Amidst public outcry, a proposed referendum to legalize alcohol failed in 2004, and Tribal leaders again voted to maintain the alcohol ban in 2006.¹⁰¹ And while this author finds that the financial benefits of a legalized alcohol trade outweigh the detrimental effect of easier access to alcohol by a people who have been so grievously injured by it, he also respects the Oglala Lakota Tribal Council's judgment about what is ultimately best for their people.

⁹⁸ Nebraska Liquor Control Commission, *2009 Whiteclay Year End Statistics*, available at <http://www.lcc.ne.gov/Revenue%20Docs/2009%20Whiteclay%20Year%20End%20Stats.pdf> (last visited December 11, 2010).

⁹⁹ See *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), generally, though courts recently have found tribes subject to state taxation in rare circumstances. See *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734 (9th Cir. 1995).

¹⁰⁰ IHS regulations require that 70% of funding dollars go to the improvement of existing facilities. Revenue derived from the taxation of beer sales on the reservation could be devoted specifically to the construction budget of the \$1.4 million facility discussed by current Tribal President Teresa Two Bulls.

¹⁰¹ Kevin Abourezk, *The Great Alcohol Debate*, LINCOLN JOURNAL STAR, Sep. 23, 2007. http://journalstar.com/special-section/news/article_97682f4b-8c61-5deb-b0d2-45b41201cb01.html

Conclusion

Thus December of 2010 finds that the people of Pine Ridge have waged the 176th year of war with white alcohol traders since it was officially prohibited in 1834. Each year the debate over what to do with Whiteclay, Nebraska finds its way into the halls of the Capitol building in Lincoln and the chambers of the Oglala Lakota Tribal Council on Pine Ridge. Each year closes without a solution. Will it take an act of the Nebraska legislature to finally end the white liquor traders' profit at the expense of the Sioux? Must it be decided by order of the President of the United States? By the Federal Courts? Will congress fund effective alcohol treatment solutions for a people dying from alcoholism? Or will the Sioux ultimately grasp this authority granted them by the 1953 act of congress, and regulate, police and profit from the sale of what has been, for 200 years, an irresistible liquid commodity? There is no easy solution to the Whiteclay problem, but history suggests that the Sioux will lose this battle, too. In America it seems that the white man always wins.