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Oglala Sioux License Plates:
A Tribal Manager Tries to Assert Tribal Sovereignty
A Teaching Case Study in Tribal Management
for Oglala Lakota College

by

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The red and blue lights spun behind him casting eerie shadows on the prairie hills around the highway and lighting up the interior of Bob Gay's car. The flickering light frightened his niece.

"They're going to take us to jail?" she asked.

"No, I don't think so."

He hadn't been speeding or driving recklessly—it had to be his tribal license plates. It was not clear what the legal implications of having Oglala Sioux plates were, but many like Bob had put them on their cars anyway. It was a matter of sovereignty and tribal pride. "At first when the [Oglala Sioux] Tribe passed the resolution that they were going to issue their own license plates I was very enthusiastic—I think everybody on the Reservation was, especially anybody who had been interested in tribal rights and sovereignty. I had been teaching Tribal Laws, Treaties and Government for a number of years and I guess I got to believing what I read—that we were a sovereign nation, that we had powers that had never been exercised.

"In my mind, *Red Lake [Band of Chippewa Indians v. Minnesota]* was a precedent. The state of Minnesota was willing to allow the Red Lake Tribe to issue their own license plates, and we had every right to do that too."

The South Dakota State highway patrolman did not agree. He gave Bob a ticket for driving without plates recognized by the state of South Dakota. It was Bob's third ticket for having tribal plates on his car. The first time he was ticketed, he defended himself on the grounds that the Tribe had the power to issue plates as a sovereign government. The judge dismissed the case claiming the state was not ready to prosecute at the time. The second time Bob received a ticket, he defended himself on the grounds that the Fort Laramie Treaty signed by Tribal Chiefs in 1868 gave the Tribe jurisdiction over all of the land west of the Missouri river. The judge dismissed the case again.

This third time, Bob was not so lucky. He argued that the comity and full faith credit clause of the Constitution applied to all Tribes and that South Dakota did not have the power

to override the Tribe's Transportation Ordinance. The judge in the case, a different judge this time, ruled that Bob was guilty and had to pay a \$45 fine.

As Bob decided whether or not to pay the fine, he thought back on the preceding year and a half. The Council had passed legislation forming a Department of Transportation in 1985. The Department was aggressively directed by Charmaine Wisecarver, who mobilized funding, conducted transportation studies, drafted supporting ordinances and negotiated with the governor to develop a reciprocity agreement recognizing plates. In the spring of 1986 the Department's initiatives began to unravel. The Governor of South Dakota suddenly dropped out of negotiations; the Tribal Council proposed a protest caravan and then reversed itself; meanwhile, tribal members began to be arrested for using the plates.

What had gone awry? Where had the Oglala Sioux Tribe gone wrong? Why had the Red Lake Band of Chippewas succeeded? Would the Oglala Sioux Tribe (OST) be able to compel the neighboring police jurisdictions or the state to recognize its plates as the Chairman of the Red Lake had done?

The Experience of the Red Lake Band of Chippewa Indians

The Red Lake Band of Chippewas had won numerous fights for sovereignty by the time the Pine Ridge Sioux selected tribal license plates as a vehicle for advancing sovereignty. In their early history the Red Lake Chippewa were successful in avoiding the perils of allotment and encroachment. The Band noticed allotted land at the White Earth Reservation slipping out of Indian ownership and refused to allot their reservation land to individual members. The Red Lake Indian Reservation remains one of a handful of closed reservations where all the land is held by the Tribe and not by non-members (see Exhibits A & B).

Their more recent successes have been orchestrated almost entirely by the Band's powerful chief executive, Chairman Roger Jourdain, who was elected chairman in the 1960s

and served until the election of 1990. Jourdain was a colorful and ardent proponent of tribal sovereignty. His thirty years as chairman began with a fight over the closure of an Indian Health Clinic that Jourdain successfully blocked. Shortly thereafter, Jourdain took on the U.S. Air Force. The Air Force had been flying missions at treetop level over the reservation, and Jourdain threatened to shoot them down with hunting rifles if they did not fly higher or elsewhere. It was his greatest bluff—the Air Force gave in.

Jourdain even out-maneuvered his political friends. Vice-president Hubert Humphrey, who was so close to Jourdain that the Chairman inducted him into the Tribe, was approached by Jourdain to help find financing for new homes on the Red Lake Reservation. Humphrey said he would look into it, but said it was unlikely that money was available that fiscal year. Jourdain took this response to mean “yes,” and obtained financing from local banks for 17 houses on the promise that Humphrey was sending the money. When the houses were almost finished, Jourdain called Humphrey and asked if he would dedicate them. Humphrey exploded, and after a few choice words to Jourdain, began looking for the money in Washington. Jourdain recalled with a chuckle years later, “I’ve never seen anyone hustle money in Washington like Humphrey did that time.”

Jourdain was also willing to bluster. He posted signs on the reservation’s borders marking the point at which the U.S. Constitution “stopped.” Beyond this point, non-members had to apply for “passports” from the tribal police. When U.S. Marshals protested that they had jurisdiction on the reservation, Jourdain threatened to have them arrested. They backed down. Yet Jourdain knew the legal limits to his grandstanding. When he told the Minnesota Attorney General not to come on the reservation to enforce gaming laws, he conceded that he might become the first tribal chairman to reside in Leavenworth Penitentiary.

Roger Jourdain’s hard-nosed tactics were not reserved for external opponents—he used them when dealing with internal, tribal opponents. After a riot in which he was run off the Reservation and the BIA building was burned to the ground, he held the Council in ex-

ecutive session for a decade and a half. Since the Council's deliberations were closed to the public and only the votes of the Council were public, the tactic stifled virtually all dissent on the reservation.

Despite the political tactics he used on the reservation, he was a strong and capable advocate of Indian sovereignty for his people and for tribes across the U.S. He was a strident opponent of Civil and Criminal Jurisdiction Act (PL 83-280) which gave certain states civil and criminal jurisdiction over reservations. Because of his opposition, the Red Lake Band is one of the few tribes in the U.S. specifically exempted from the law. Jourdain was also a powerful proponent of the Indian Self-Determination and Education Act (PL 93-638) and the Indian Financing Act.

Jourdain vigorously applied his skills and strong will to the task of obtaining license plates for his Band. Over their objections, Jourdain had the Tribe's attorneys draft a transportation ordinance to register motor vehicles and to provide for the certification and transfer of titles. Roger Jourdain had seen the provision of tribal license plates as a right of a self-governing tribe, a tool for raising revenue to pay for maintenance on the 275 miles of tribally maintained highways, and a mechanism for stimulating tribal pride and asserting tribal sovereignty. At the time, there were 300 to 400 vehicles owned by residents of the reservation, all of whom paid fees to the state of Minnesota. Those fees helped pay for some road maintenance—65 miles' worth on routes 1 and 89—but no state money defrayed the Band's maintenance costs for the other 80% of the reservation's roads (see Exhibit B).

Since it was likely to be examined in a court of law, the ordinance contained provisions covering virtually every contingency including: exemptions, grounds for refusing plates, fraudulent applications, suspension of registration, and lost, stolen or mutilated titles. The ordinance also stipulated fees ranging from \$3.50 to \$35 for registration and a fee of \$2 for certifying the title. By the first Tribal Council meeting of 1974 the ordinance was ready for a vote. It passed on January 16, 1974.

When the motor vehicle ordinance passed, it immediately thrust the Band into conflict with the state of Minnesota. As is customary among states and between states and foreign provinces, the Red Lake Chippewa Band requested that the State of Minnesota recognize the Band's ordinance by negotiating a reciprocity agreement exempting vehicles licensed by the Band from the taxes and fees of the state. Instead, the state withheld recognition and threatened to arrest motorists who had Red Lake plates but not Minnesota plates. To prevent such arrests, the Band sought judicial relief. On March 1, 1974, the St. Louis District Court in Duluth entered a temporary restraining order prohibiting such arrests until the court could hear the Band's and the State's positions. Within days, the Band's case was strengthened by the U.S. Department of Interior's approval of the motor vehicle ordinance.

Seven months later, the district court issued an order of declaratory judgment and permanent injunction in favor of the Band. Judge Patrick O'Brien ruled in favor of the Band for five reasons. First, he claimed the Band had the right of self-governance under a constitution approved by the Secretary of the U.S. Department of the Interior. Second, the federal government expressly exempted the Red Lake Chippewa Band from Public Law 280 which gives certain states civil and criminal jurisdiction on reservations within their borders. Third, the Band received no payments for construction or maintenance of reservation roads, though the Band allows motorists registered in Minnesota and elsewhere to travel on them. Fourth, the state would cause "irreparable damage" to the Indians who must travel off the reservation were the state to force them to register their vehicles in Minnesota in addition to registering them on the reservation. Finally, Judge O'Brien ruled that the ordinance was a genuine attempt to regulate motor vehicle use and "not a subterfuge to get around state of Minnesota motor vehicle laws."¹ Though these arguments seemed sensible (if not definitive) to the Band's leaders, there was yet another round of legal conflict.

¹ *The Minneapolis Star*, Friday, November 22, 1974, p. 22A.

State Attorney General Warren decided an appeal was warranted and the Minnesota State Supreme Court agreed. Arguments were heard and in December of 1976, Chief Justice Sheran issued a decision in the Band's favor.

Though the decision was similar to the District Court's, it depended on arguments which were based on the special status of the Red Lake Tribe. Chief Justice Sheran argued that the ordinance was an appropriate exercise of self-government. He followed the lower court's argument that the state was bound not to undermine the Band's right of self-government unless there was a substantial consideration to do so.

To grant the privileges contemplated by [state reciprocity statutes] to the residents of governmental entities listed in the relevant statutes and to deny equal treatment to the Red Lake Indian Reservation would be to significantly dilute the effectiveness of the governing authority of the Tribal Council. The result of doing so would be to make the motor vehicle registration licenses issued by it less worthy than comparable licenses issued...by the District of Columbia, the State of Wisconsin, and the Province of Ontario in the Dominion of Canada.²

And, he found no substantial considerations that would merit such a weakening of the Tribal Council.

This argument was built on a foundation of law that may have applied only to the Red Lake Tribe. The cornerstones of this foundation are a Minnesota State Supreme Court precedent and Public Law 280. The State Supreme Court had ruled repeatedly on the "unique status of the Red Lake Band."

As we have frequently said, when Congress enacted Public Law 280 in 1953, which conferred on the state civil and criminal jurisdiction over other Indians in the state, it expressly excepted the Red Lake Reservation.

The question, then, in cases involving assertion of a right by the state against members of the Red Lake Band is whether the action of the state will undermine the tribe's right of self-government.³

² *Red Lake Band of Chippewa Indians v. State and Another*, 248 N.W. 2d 722, p. 244.

³ Sheran quoting *Commissioner of Taxation v. Brun*, in *Red Lake Band of Chippewa Indians v. State and Another*, p. 246.

The Red Lake Band was one of three tribes explicitly exempted from PL 280. The law gave California, Nebraska, Minnesota, Oregon, Wisconsin, and later, Alaska criminal and civil jurisdiction over the reservations within their states with the exception of the Red Lake Chippewa, the Warm Springs and the Menominee reservations. It also allowed other states to amend their laws to assert such jurisdiction—ten did so, including South Dakota, which asserted jurisdiction only if the federal government paid the costs, but this assertion was struck down by the state Supreme Court.

In Minnesota law, the exemption of the Red Lake Chippewas from PL 280 translated into a series of precedents that strengthened the Band's sovereignty. Repeatedly, judges withheld jurisdiction from the state thereby allowing jurisdiction to stay with the tribe. The state courts determined: i) that enrolled members were allowed to hunt game out of season on the reservation, ii) that non-members were allowed to be prosecuted on the reservation for murdering other non-members on the reservation, iii) that the state could not prosecute burglaries on the reservation regardless of the victim's status as a member or the ownership of the property, iv) that state courts did not have jurisdiction over negligence action arising out of incidents on state-maintained highways on the reservation, and iv) that the state could not collect income taxes from enrolled members of the Band employed on the reservation.⁴ As one judge put it:

the Red Lake Band of Chippewa Indians still retains much of the autonomy originally referred to in *Worcester*, and the states may not interfere with this self-government....As we have pointed out...few Indian tribes in the United States retain the sovereignty and the right to self-government retained by the Red Lake Band of Chippewa Indians.⁵

⁴ This list of precedents could extend tediously. For a more complete listing, see *Commissioner of Taxation v. Brun*, No. 41410 Supreme Court of Minnesota.

⁵ Chief Justice Knutson, in *Commissioner of Taxation v. Brun*. The Worcester decision (*Worcester v. Georgia*, 1832) declared that tribal governmental powers, with some exceptions, are not granted by Congress but are inherent powers of a limited sovereignty that have never been extinguished. Later decisions of the U.S. Supreme Court determined that powers not limited by federal statute, treaty, or restraints implicit in the protectorate relationship remained with the tribe. For a more detailed discussion see, American Indian

This chain of precedents made it easy for Chief Justice Sheran to support the lower court and affirm its decision to allow the Band to license its own vehicles. Accomplishing the same in other states proved to be more difficult.

Getting Started at the Pine Ridge Reservation

As early as 1977 the Oglala Sioux Tribe passed an ordinance taxing motor fuels in order to fund highway maintenance. In 1982 the Tribe approached a consultant to draft enabling legislation to license and register vehicles. Nothing materialized. Two years later, in the summer of 1984, Charmaine Wisecarver was contacted by the one of the tribal attorneys and ultimately by the Tribe to put together a feasibility study of the potential costs and benefits of licensing vehicles and the possibility of starting and operating a Tribal Transportation Department. At the time, it was not clear whether tribal leaders stood forcefully behind the program, but Wisecarver perceived it to be a good defense against the erosion of sovereignty.

In the spring of 1984, the Oglala Sioux Tribe failed in its bid to stop the consolidation of Washabaugh County into Jackson County. Washabaugh County had been entirely within the reservation boundaries, and Jackson County was not. Since the Oglala Sioux tribal government had a standing policy of not recognizing county governments, the Washabaugh County seat was located in Jackson County. This unusual situation generated pressure for the administrative consolidation of the two counties. The Tribe went to court to block the merger of the two counties but lost. The only redeeming component of the court decision was that Jackson County could not assume any more jurisdiction than Washabaugh County had already asserted over Washabaugh's territorial extent. Thus, only the county seats and

territorial boundaries were consolidated; county administration remained relatively undisturbed.

Nonetheless, the consolidation was cause for uneasiness in the leadership of the Tribe. Mario Gonzalez, the tribal attorney who had argued the court case against consolidation was wary that the Jackson-Washabaugh merger would precipitate a merger of Fall River and Shannon Counties. Shannon County was entirely within tribal boundaries and had its seat in Fall River. Gonzalez was also concerned that the counties would usurp the OST's inherent governmental powers, such as providing basic governmental services to tribal members.

When Gonzalez ran into Wisecarver shortly after the merger, he explained the need for the Tribe to be more assertive in offering basic services to members, and they discussed the possibility of creating tribal vehicle licenses. Wisecarver was intrigued. Not only was she looking for work; she saw a comprehensive vehicle licensing program as strategy for exercising and strengthening the Tribe's sovereignty. It seemed her training in South Dakota regulatory administration and her familiarity with South Dakota law could be put to good use for her people.

By most accounts, the greatest problems facing the Oglala Sioux Tribe hinge on tribal sovereignty and development. The Tribe has seen its land base and powers dwindle steadily in the years since the Fort Laramie Treaty of 1851. Originally, the Great Sioux Nation included large portions of Nebraska, Wyoming, Montana, and all of the Dakota Territory west of the Missouri River, but an act of Congress reduced it to five reservations, none of which include the Sioux's most sacred territory, the *Paha Sapa*, or Black Hills. The Oglala Sioux's traditional system of government—a parliamentary system in which leaders of bands joined in a strong council to select a head man—was replaced by a constitution giving power to a centralized presidency with a two-year term. The consequence has been a presidency in which few can be re-elected—the constituted government is seen by many as illegitimate and

the term is so short and obstruction so common that few can build a legacy. The government has great difficulty addressing the reservation's problems effectively or permanently.

As territorial integrity, governmental effectiveness, and legal sovereignty eroded, so did living conditions deteriorate. Today, the Pine Ridge Reservation (see Exhibit A), home of the Oglala Sioux Tribe, contains the county with the lowest income per capita in the nation—25.7% of the national average. Sixty percent of the reservation's high school students drop out. Infant mortality rates compare with those of Bulgaria and Costa Rica. Unemployment estimates range between 50% and 87%. The reservation is home to some of the most dire social circumstances in the U.S.

Wisecarver believed that establishing a Tribal Transportation Department would begin to address at least a small set of the problems that made this social and political situation so bleak. At the time, it was the express policy of certain South Dakota coalitions to weaken tribal governments. In particular, in 1980 and annually for several years thereafter, the South Dakota Association of County Commissioners declared in its policy statement that it favored Congressional legislation to "bring all of South Dakota including Indian reservations under state jurisdiction," and to allow counties to tax fee-patent and deeded land which had been placed into tribal trust through purchase or transferal. While such Congressional legislation may have been a long shot, this declaration and others like it gave credence to the belief that the Tribe's enemies were still dangerous and aggressive. At a minimum, the counties would work surreptitiously to undermine tribal sovereignty.

Wisecarver hoped that creating a viable Department and issuing license plates would show governments outside the reservation, as well as members of the Tribe, that the Tribe took its sovereignty seriously. Wisecarver also believed that taking responsibility for transportation would be good for the morale of the Tribe. Oglalans could be proud of their license plates as the Chippewas had been. A Tribal Transportation Department, if it were successful,

might inspire the Tribe's Council and managers to pursue other avenues of extending sovereignty and developing government capability.

Wisecarver's feasibility study was the first substantive effort to elaborate the intentions of earlier resolutions and contracts. She proposed a self-funding department of registry relying on fees to cover operating expenses after the first year. Roughly 2,300 vehicles registered annually for \$20 each would be enough to cover the costs of two staffers' salaries, office equipment and supplies, and license plates. (The State of South Dakota charged \$20 to \$180 for registration depending on vehicle weight.) She also proposed some other options for the Tribe to consider. First, the Tribe could contract the functions of the BIA Roads Department under PL 638.⁶ Second, the Tribe already had a motor fuels tax to pay for road and bridge maintenance. (A large portion of South Dakota's highway funds are from fuel taxes.) Third, the Tribe could pursue directly receiving federal highway funds which had been going to the states. Fourth, the Tribe could consider a license plate manufacturing plant. Finally, the Tribe would have to consider negotiating with the state over the costs of road and highway maintenance. While the feasibility study did not examine any legal conflicts which could arise from tribal licensing, Wisecarver felt the study was a good foundation on which to begin assembling a Tribal Vehicle Licensing & Registration Office.

In the fall and winter of 1984 Wisecarver began to implement some of the policy ideas emerging from her feasibility study. She began by determining what a legally-effective transportation ordinance would have to include. After contacting tribes with transportation laws, the state Department of Transportation, and neighboring counties, she drafted a proposed ordinance. In October she submitted a "proposed Oglala Sioux Tribe Vehicle Licensing, Registration and Titling Ordinance" for Tribal Council's review. The ordinance included provisions for licensing, titling, registration and special use compensation, and it set

⁶ Under the Indian Self-Determination and Education Assistance Act of 1975, PL 93-638, tribes can assume responsibility for federally funded programs administered by the Bureau of Indian Affairs or by the US Indian Health Service.

the fees for non-commercial vehicle licenses lower than the state's. By March of 1985 a revised version passed in the Tribal Council.⁷ She then submitted a funding proposal to the Administration for Native Americans (ANA) so that the department could begin operations without waiting for the conclusion of revenue-sharing negotiations with the state. Despite having incorporated recommendations from South Dakota Governor William Janklow in order to secure smooth negotiations, she knew working with the State would take a long time.

At the time, she was optimistic—she predicted that the Tribe would begin issuing vehicle titles in July 1985 and license plates in early 1986. Newton Cummings, the President of the Oglala Sioux Tribe, had shown a keen interest in pursuing this issue, and he was committed to support Wisecarver politically. Furthermore, Governor Janklow seemed to endorse the project. At first, Wisecarver expected that the state would resist such a bold and visible assertion of sovereignty, but Janklow seemed cordial and helpful. He encouraged the Tribe and offered suggestions on how the ordinance might be strengthened. Nevertheless, there was reason to consider a backup strategy in case things began to unravel. The Lakota had been the victims of double-dealing and reneged promises for a century-and-a-half, and their well-founded distrust led them to believe that the state could turn on them. In this case, Wisecarver also focused on legal strategies just in case the Tribe could not obtain what it wanted via negotiation with the Governor.

The Legal Side of the License Plates Issue

The license plates issue raised questions of legal jurisdiction on Indian reservations—questions addressed in large measure by the Civil and Criminal Jurisdiction Act (Public Law 280). Public Law 280 (PL 280), which played a pivotal role in the *Red Lake* decision, had a considerably more turbulent history in South Dakota than in Minnesota. As mentioned

⁷ Ordinance to Adopt the Oglala Sioux Tribe's Vehicle License, Registration, and Title Ordinance, the Oglala Sioux Tribe's Driver's License Ordinance and the Oglala Sioux Tribe's Bicycle Ordinance, Ordinance No. 85-04.

above, the Red Lake Band was expressly exempted from PL 280. South Dakota, on the other hand, was not referenced at all in the statute. Instead, the state fell under a provision that allowed states not directly covered by the statute to assume criminal and civil jurisdiction over tribes, “at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind to the assumption thereof.”⁸ In 1957, the South Dakota legislature passed a law stipulating that civil and criminal jurisdiction would pass to the state if the tribes agreed by referendum and the County Commissioners of the appropriate counties agreed. Prior to approval of the transfer, however, the Board of Commissioners would have to be reimbursed by the Bureau of Indian Affairs for the costs of maintaining jurisdiction. This was the provision struck down by the State Supreme Court in 1959.⁹

Two years later the South Dakota legislature passed a law to “assume and accept all jurisdiction of all criminal offenses and civil causes of action arising in Indian Country.” But the statute stipulated that South Dakota would only “assume and accept” jurisdiction over “criminal offenses or civil causes of action arising on any highways” until the Governor made a declaration assuming jurisdiction over all of Indian Country. This technicality caused the State Supreme Court to strike down the sections of the law assuming jurisdiction because it found that assuming partial jurisdiction over Indian Country violated the provisions of PL 280.¹⁰ This decision seemed to leave jurisdiction over highways to the tribes once and for all.

However, a decision by the US Supreme Court raised questions about PL 280 again. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation* (1979) the U.S. Supreme Court allowed the possibility that PL 280 was broad enough to authorize the state to assume partial jurisdiction. The state of Washington had assumed partial jurisdiction over the Yakima Reservation and obligated itself to assume full jurisdiction if the Bands and Tribes requested it. The Supreme Court held that this action did not violate the

⁸ 28 U.S.C. §1360.

⁹ *In re High Pine*.

¹⁰ *In re Hankins*.

intent of PL 280. The practical implications of this decision were not clear at the time the Oglala Sioux license plate issue arose. Some of the Tribe's attorneys felt that the *Yakima* decision did not affect the Tribe's authority to issue license plates since the decision did not apply to states who assumed partial jurisdiction. In other words, they reasoned, South Dakota would only accept jurisdiction over highways if the state were reimbursed by the BIA for assuming other jurisdictions. Another point of view held that it would be unwise to begin a suit over highway jurisdiction since the *Yakima* decision might be used by state courts to reinterpret the previously invalidated laws of 1957 and 1961.

There was also a question of whether the license plates fell under PL 280 at all. The law stipulates "civil and criminal" jurisdiction. By contrast, because the Oglala Sioux Tribe was exercising *regulatory* powers, and not making criminal or prohibitory law, there was a possibility PL 280 did not apply. Under this line of reasoning, South Dakota could not require the tribal members to register their vehicles for use inside the reservation nor could they impede the Tribe if it attempted to require all people residing within the reservation to register their cars there. Such strong measures would certainly create hardships for member and non-member residents and might not constitute a practical public policy in the long run. However, if the distinction between regulatory and civil/criminal powers was valid, the Tribe might be able to precipitate a crisis in which the state had to back down. It might also be able to win a preliminary injunction or temporary restraining order.

These undecided legal questions made strategic thinking difficult for Wisecarver and other leaders working on license plates. It was hard to predict how the courts would react to questions regarding jurisdiction under PL 280, and thus, preparing for negotiations or conflicts with the state was not straightforward. Their efforts were not aided by the dramatic turn of events in the spring of 1986.

The Collapse of Negotiations

In the summer and fall of 1985, Wisecarver, the attorneys, and the Council worked on the details of the license plates and transportation department start-up. Tribal attorneys and officials at the U.S. Department of Transportation investigated whether or not federal laws allowed the Oglala Sioux Tribe to work directly with the Federal Highway Administration, bypassing the State and BIA. It could not. President Cummings and Charmaine Wisecarver met with the Governor's staff to discuss the ordinance and the possibility of a reciprocity agreement between the State and the Tribe.¹¹ At one point the Governor told the *Lakota Times*, a regional paper covering Indian issues, that the license plates would be legal in counties where the tribe had jurisdiction and not in counties (like Bennett County) in which the Oglala Sioux Tribe had checkerboard jurisdiction.

A meeting between the Governor, Wisecarver, and President Cummings was scheduled for September of that year. According to Wisecarver and Cummings, at the last minute the Governor declined and they met instead with Jim Myers, the chief of operations. Afterward, nearly a month passed without any response from Myers or the Governor. This was disconcerting to Wisecarver since plates were to be issued January 1, 1986. In late October, President Cummings wrote to the Governor interpreting the silence after the September meeting as approval and suggesting a joint press conference to announce a reciprocity agreement on November 12, 1985. As the letter said, "...such an agreement would be primarily beneficial for South Dakota [by] showing that good will exists between the state and the Tribe." Still, the Tribe received no word from the Governor.

¹¹ The fifty states and many countries sign reciprocity agreements recognizing each other's transportation laws, registrations and licenses. These agreements are what allow a resident of New Jersey to drive a vehicle registered and licensed in New Jersey through Nebraska or any other state. As of 1992, the Red Lake Band did not have a reciprocity agreement with Minnesota though the state had repeatedly approached the Band about getting one. The force of the Supreme Court ruling in *Red Lake* was enough to prevent the state from impounding Red Lake vehicles and leaders of the Band saw no reason to cooperate with the state.

On the day he had been invited to a press conference, word finally came from the Governor, but it was not good news. Governor Janklow had mysteriously reversed himself. He wrote a letter saying, "South Dakota statutes clearly do not authorize" tribal licensing of vehicles on the reservation and sent a telegram with the same message. "It is my duty to inform you that tribal members will be required to purchase South Dakota license plates." This reversal stunned the Oglala Sioux Tribe and President Cummings wrote to the Attorney General to determine how the state had arrived at this new position regarding tribal license plates. The answer was perplexing. Attorney General Mark Meierhenry concurred with the governor and cited South Dakota Codified Law (SDCL) 1-1-17, a section Wisecarver believed had been struck down by the South Dakota Supreme Court a quarter century earlier (in *In re High Pine*).

It was beyond the imagination of Wisecarver and her associates what the reasoning for this reversal might have been. At first glance, it seemed like the result of a lobbying effort to force the governor to go against his commitment to tribal license plates. Possibly the counties had pressured the governor since they were likely to lose revenues. Counties collected registration and licensing fees, passed them on to the state treasury, and then the Department of Transportation distributed the revenues with 42% going directly back to counties on the basis of land area and street mileage.¹² This formula meant that *all* counties would lose some revenue, but no one county would bear the brunt of the revenue shortfall resulting from a tribe's adoption of a registration ordinance. It did not seem logical for a few counties adjacent to the Tribe to argue a major loss, given this formula.

The county governments may have also been upset about the potential for losing right-of-ways if Indian reservations began to take control of road maintenance on the reservation. In the case of the Pine Ridge Reservation, however, this was probably not a major issue. The counties overlapping the Reservation were not sure of how many miles of right-

¹² This formula is spelled out in SDCL 32-11-4.1.

of-way they had on the reservation, yet it was certainly less than twenty miles (see Exhibit C). The vast majority of roads on the reservation were maintained by the BIA or the State. Nevertheless, county commissioners in counties neighboring other reservations might have been worried about the precedent the Governor would set by recognizing the Oglala Sioux Tribe's transportation ordinance.

Finally, the state may have been interested in reasserting jurisdiction over reservations since the *Yakima* decision had re-opened the question of partial jurisdiction. Recognizing the Oglala Sioux Tribe's license plates would have acknowledged the Tribe's jurisdiction over the reservation and would probably have led to similar jurisdictional controversies elsewhere in the State.

At the time, it was not clear to Wisecarver what constituency would have been behind such a pressure, but then again, it did not seem to matter to the Tribe's leaders. They were now in direct confrontation with the State and had to plan their next move.

Going Ahead with Licensing

The new year began with Oglala Sioux Tribe members believing they had to register their license plates with the Tribe. In order to prevent an unplanned legal confrontation with the state and to make up for production delays, Wisecarver issued a legal notice postponing the deadline for license plate purchases until March 31, 1986. This gave the President, Wisecarver, the attorneys and the Council three months to plan their strategy and prepare for full engagement with the state. It turned out to be a busy three months.

The strategy of the Tribe broke down into six main angles of attack, each of which received varying amounts of attention from an array of tribal officials and representatives. First, President Cummings approached the executives of the other Sioux tribes in South Dakota. Second, tribal officials, including the Tribe's attorneys, made numerous attempts to convince the Governor that his legal opinion on license plates was flawed. Third, the attor-

neys, Wisecarver, the Council and the President debated what kind of case to precipitate in order to win the Tribe's rights in court. Fourth, the Tribe approached the State of Nebraska and surrounding towns and counties for political support, especially the commitment to recognize tribal plates. Fifth, the attorneys pressured the Tribe to make the transportation ordinance and Constitution more robust in order to strengthen its defensive options. Finally, late in this three month period, the Tribal Council considered taking direct action, such as a public protest, to force an open confrontation with the governor.

Approaching Other Tribes

Early in January of 1986, President Cummings wrote to the leaders of the eight other tribes within the state to explain the "emergency situation" which had emerged and to ask for their support in confronting the governor. Judging from State Attorney General Meierhenry's letter, it seemed that the Governor was interested in resurrecting the laws which accepted partial jurisdiction over reservation highways. If, in fact he was interested, all the tribes had a vested interest in joining with the Oglala Sioux Tribe to oppose Janklow's maneuver. President Cummings asked the other leaders to join in a law suit in Federal Court for an injunction and declaratory relief. Such a joint effort never materialized.

Addressing the State's Legal Arguments

Later that month the Tribe's law firm in Washington, D.C., Hobbs, Straus, Dean and Wilder ("Hobbs, Straus" hereafter), began a correspondence with Governor Janklow over the legal justification for the Tribe's ordinance. Hobbs, Straus argued that the Tribe had the authority to require tribal members to register their vehicles on the reservation and that the Tribe could require non-member residents to do the same. The implication of this assertion was that the Tribe could arrest South Dakota residents on the reservation if South Dakota refused to recognize the OST plates and the residents did not obtain OST plates. The lawyers went on to illustrate the legal strength of the Tribe's authority and to argue that the state did

have the power to recognize the Tribe's plates since the Tribe qualified as a "jurisdiction." The attorneys pointed out that the state was required to "promote and encourage the fullest possible use of its highway system by authorizing the making and execution of motor vehicle reciprocal or proportional registration agreements," with other jurisdictions.¹³ They further argued that the Tribe was included in the meaning of *jurisdiction* in the clause that stipulated that South Dakota had the right to enter into reciprocal agreements.

Even if the state felt that the Tribe could not issue plates or that the state lacked authority to negotiate, the Tribe wanted to settle the matter amicably. Rather than require some South Dakota residents to register in both places, the law firm suggested that the Tribe and the state work on developing legislation specifically authorizing tribal license plates. It was felt at the time that the governor had supported license plates as a matter of policy and that statements opposing the tribal plates had to be taken at face value, i.e., the government had only legal objections to the policy. Unfortunately, this strategy was limited by the short time left in the legislative session.

In concert with these direct overtures to the state government, the law firm investigated the approval of the ANA grant supporting the department for its first three years to determine if the grant approval process had turned up any opposition to license plates. In processing the grant the ANA had conferred with Myers, the Governor's chief of operations. Myers had expressed doubts about the ability of the Tribe to administer a licensing and titling program. Unfortunately, neither the ANA nor Myers had discussed the legal authority of the Tribe to issue plates or the likelihood of the state's recognition of the plates.

Legal Strategies

The legal question facing the Tribe was: What kind of case would give the Tribe the greatest likelihood of winning a favorable decision? One strategy might be to seek a declara-

¹³ SDCL §32-10-2.

tory judgment that the state had no jurisdiction and permanently enjoin the state not to charge vehicle owners who registered their vehicles with the Tribe. This was the strategy that President Cummings had proposed in his letter to the other Sioux leaders, and it had been the successful strategy of the Red Lake Band. One problem with this approach was that the Tribe would have to convince a judge there was a real likelihood of winning on the merits—a harder standard to meet than a regular civil suit would require.

Another problem with this strategy was the choice of court in which to file suit. The state courts were an obvious option. However, South Dakota lacked the strong legal tradition of non-interference in tribal self-government which had been so crucial in the *Red Lake* case. Furthermore, recent cases suggested that these courts would use *Yakima* to rule in favor of partial state jurisdiction over reservation highways. As recently as January of that year, a state circuit court judge had handed down two decisions which applied *Yakima* to allow the state partial PL 280 jurisdiction over Indian reservations. The BIA Field Solicitor felt the cases, referred to as *Goodnick* and *Medearis*, were not a sound basis for the Attorney General's assertion of state jurisdiction and that *Red Lake* was more appropriate to the Oglala Sioux Tribe's situation.¹⁴ Nevertheless, *Goodnick* and *Medearis* raised serious doubts about the likelihood of success in the state court system. Until a higher state court ruled on either case, this application of *Yakima* to the question of South Dakota's jurisdiction over highways on reservations dampened the Tribe's hopes. Suing in federal court was not a possibility, however. The Eleventh Amendment to the Constitution prohibited the federal courts from ruling on matters of state law.

A second legal strategy was for the Tribe to impound the vehicle of a non-member who resided on the reservation and wait for the state to sue on the non-resident's behalf. Fair

¹⁴ The judgments *Goodnick* and *Medearis*, both involving incidents occurring on the closed portions of the Rosebud Sioux Reservation, asserted that South Dakota could assume partial jurisdiction over Indian reservations because of the *Yakima* decision. The Office of the Field Solicitor of the Department of Interior thought this conclusion was "debatable." Nevertheless, the existence of the decisions made a strategy of pursuing a state court case, "not promising."

enforcement of the transportation ordinance would be critical so that the Tribe would not violate the Indian Civil Rights Act—an action which would be fatal for the Tribe in any litigation over the impoundment—but the litigation would be straightforward. This strategy, as recommended by Hobbs, Straus, Dean and Wilder, would compel the Governor to negotiate a reciprocity agreement, presumably because enough non-member impoundments would put political pressure on the Governor.

The third legal strategy put forward was to send a tribal government employee or even Council Member off the reservation, in a tribally owned vehicle on tribal business. The Ninth US Circuit Court, had recently decided in *Queets Band of Indians* that the State of Washington was required to recognize tribal registration of tribally-owned vehicles. The court found that tribal interests in licensing their own vehicles were more compelling than tribal interests in licensing members' vehicles. The converse was also true: the state had a compelling interest in licensing its own vehicles even if they were parked on the reservation most of the year.¹⁵ This strategy was logistically problematic. Many tribally-owned vehicles were paid for with grant or contract funds that were regularly monitored or audited by the funding agencies. This made it nearly impossible for Wisecarver to find a tribal official who had a truly tribal vehicle, who was willing to risk its impoundment, and who was willing to risk being fined and drawn into a long-lasting lawsuit.

A fourth strategy, which seemed to have a great deal of informal public support on the reservation, was to have several members drive off the reservation with tribal plates and be arrested by state police. About two dozen volunteers had presented themselves to the Tribe as being willing to risk the \$100 fine, 30-day imprisonment or impoundment of their vehicles in order to advance the Tribe's sovereign rights. Many had switched from South Dakota plates to OST plates and were already being stopped and fined. More than 40 arrests were

¹⁵ The Transportation Ordinance required all vehicles parked more than 21 consecutive days or 60 days in a year to be in compliance with the registration provisions of the ordinance regardless of ownership. This implied that the Tribe could require state vehicles to be registered on the reservation.

made. As Bob Gay's experience showed, the state courts were not sure how to treat these plates, although the state police had fairly straightforward guidelines to enforce the state's registration requirement.

By the time the March deadline arrived, no formal choice had been made by the Tribe about which one of the three strategies to pursue. Instead, once Wisecarver approved the issuing of plates, this fourth strategy wound up as the default option since the use by and arrest of tribal members was inevitable. However, the Tribe never made a definitive decision to follow up the arrests with lawsuits. This was probably because, without a reciprocity agreement with South Dakota or a restraining order from a judge, the Tribe could not make a forceful argument that its plates should be recognized off the reservation.

These legal strategies were likely to be high-cost ways of compelling the State to recognize tribal license plates. It was probably inevitable that litigation following any initial incident would be drawn out into appeals before the Governor negotiated a reciprocity agreement. It was also not clear how much political support there was for these scenarios. To Wisecarver, it seemed like there was grassroots support for the plates and for the Tribe's right to enforce their use, but that support was fading at higher levels and threatened to involve the Tribe in a lawsuit with unfavorable terms. The last thing the Tribe needed was for a member with a substantial record of moving violations to be fined or imprisoned for improper registration. The facts of such a case would make victory difficult. Furthermore, as Hobbs, Straus felt, *defending* the application of the Tribe's ordinance to non-members on the reservation would be more favorable than *challenging* the State's non-recognition of tribal plates.

Attention and commitment to the license plates issue at the highest political levels wavered and eventually faded. President Newton Cummings, who had contributed considerable time and effort to the license plates issue, was voted out of office in the February 1986 elections. His successor, Joe American Horse, was less inclined to confront the state directly.

Moreover, he may have viewed it as politically risky to champion the former president's causes. These two tendencies weakened the strength of the Tribe's position on the license plates issue. President American Horse felt pursuing the plates would increase tribal sovereignty, but he never committed to the issue. Furthermore, the newly elected Council did not appear to be in full support of the issue either. Several Council members were not re-elected and their replacements were not well aware of the history of the issue nor of the strategic debates that had taken place. This made them reluctant to act aggressively on this issue. Late in the spring of 1986, for example, they passed an ordinance and issued a press release calling for a strategy of "protecting sovereignty" while "avoiding confrontation with the Governor of South Dakota." To Wisecarver and others who had tried working with Governor Janklow, this seemed a retreat from the assertive stance the Tribe needed to take with the State.

Lobbying Surrounding Counties and Towns

Efforts were also under way that spring to garner the support of the Chambers of Commerce in surrounding towns. In March tribal representatives approached the merchants of Whiteclay, a reservation town in Nebraska. Consequently, these merchants wrote to Governor Bob Kerry "in support of an agreement between the State of Nebraska and the Oglala Sioux Tribe on the mutual recognition of license plates." The Mayor of Gordon, Nebraska, a reservation border town, and the Chamber of Commerce of Chadron, Nebraska wrote less committal letters to the Governor and the Department of Transportation, but nevertheless endorsed the Tribe's right to issue its own plates. South Dakota towns near the reservation were unwilling to do the same, perhaps because of fear of retribution in future political horse-trading with the Governor or perhaps because they had opposed license plates from the start and had instigated the Governor's reversal. (It was not clear which it could have been.) The one exception was the Shannon County Commission. Shannon County comprises the bulk of the reservation's territory and is wholly contained by the reservation. The County Commis-

sioners agreed not to prosecute vehicle owners with tribal plates until the South Dakota Department of Motor Vehicles made an official policy decision. This commitment was not surprising since there was not a great deal of debate over whether the Tribe had the authority to issue plates to members who would not leave the reservation.

Direct appeals by the Tribe to the government of Nebraska yielded unhelpful results. The Tribe asked the Nebraska Director of Motor Vehicles, Holly Jensen, to comment on the license plates ordinance and to consider a reciprocal agreement with the Oglala Sioux Tribe. She, like representatives of the executive branch of South Dakota, found that there were legal obstructions to the Tribe's assumption of licensing jurisdiction. In a memo to Jensen, the Nebraska Department of Justice argued that PL 280 applied only to those "matters over which the federal government had earlier had authority."¹⁶ And since licensing was a matter of state authority, Nebraska had "control over and responsibility for civil matters including motor vehicle registration." The Nebraska Attorney General also was concerned that recognition would "exacerbate the problems between the State of South Dakota and the Tribe." Finally, the Nebraska Attorney General argued that *Queets* rejected the notion that the Tribe was a "territory or possession of the United States," and that the legislature would have included the Indians in the reciprocity statute if it had wanted to give them licensing authority.¹⁷ Though Jerry Straus of Hobbs, Straus, Dean and Wilder felt the Attorney General's opinion was flawed and did not affect the confrontation with the Governor of South Dakota, it raised more questions about the wisdom or practicality of a legal fight with the State.

Changing the Ordinance

In addition to the above steps, the Tribe had to cover all possible legal contingencies, and to do that, it had to amend the Transportation Ordinance. In early March the attorneys

¹⁶ Cohen, F., *Handbook of American Indian Law*, (1982), p. 367. as quoted by Nebraska Attorney General, Robert M. Spire, in a memo to Holly Jensen, 3/27/86.

¹⁷ *Ibid.*

from Hobbs, Straus proposed a Temporary Emergency Motor Vehicle Registration Provision to President Cummings. The amendments required that owners to whom the ordinance applied were to register their vehicles within one week of passage of the ordinance, that all provisions of the ordinance applied to non-member residents, that vehicles parked on the reservation for more than 21 days fell under the scope of the ordinance, and that vehicles in violation of the ordinance could be impounded. These provisions made possible the successful implementation of the strategy forwarded by Hobbs, Straus, namely impounding a non-member's vehicle.

One week later, Hobbs, Straus amended their suggested amendments. They added a clause which allowed non-member residents to register in jurisdictions that recognized tribal license plates. They also amended the clause relating to impoundments to allow owners of impounded vehicles to contest the impoundment. This would prevent any suit brought by a non-member from being dismissed on the technicality that the Tribe had not provided for due process in its ordinance. Finally, a week after that, Jerry Straus suggested that the Tribe issue warnings to violators so that all who intended to comply with the law would be given ample opportunity to do so. All these amendments to amendments made it seem as if Hobbs, Straus were making strategy piecemeal, a realization that made some tribal managers a little nervous.

Direct Action Contemplated by the Tribal Council

In addition to the haphazard debate over legal, legislative and political strategy, there was also a debate in the Tribal Council about whether or not there should be an officially sanctioned protest caravan of tribal members in vehicles with OST plates. As it was contemplated by some on the Council, there would be a caravan of vehicles registered by the Tribe that would drive from the reservation to Rapid City. The intent would be to precipitate so many arrests that media attention would be drawn to the issue and thereby force the Governor's hand. This proposal struck a cord with the reservation's general public, and it re-

ceived a unanimous vote in the Council in mid-April. To bolster their numbers, the Council agreed to provide plates to members free of charge. To strengthen the Tribe's hand, the Council also adopted the amendments to the transportation ordinance proposed by Hobbs, Straus. Nevertheless, it was not yet clear that the Tribe had committed itself to a strategy, as was highlighted in the commentary of Tribal Press Liaison, John Steele: "If South Dakota is not going to recognize our plates, are we going to recognize theirs when we have a non-resident driving through? That question has not been answered."

Only days before May 1, the day the caravan was supposed to occur, the Council met in executive session and postponed the event indefinitely. One justification, given by President American Horse, was that neither the Mayor of Rapid City nor the Pennington County Commission would be in Rapid City. Second, a rumor circulated that the State was planning to declare a day of amnesty on the day of the caravan, thereby stealing the media thunder. Third, some council members became concerned about the potential arrests of their constituents. Verdell Mesteth of Pass Creek presented a resolution to the Tribal Council drafted by the District Council that would stop the caravan and extend the deadline for licensing vehicles until the plates had been declared legal by the Governor. The resolution did not pass, nevertheless the Council voted to postpone the caravan at least until meeting with Jerry Straus May 6, 1986.

In Wisecarver's opinion, action was not moving in a coordinated fashion. Some approaches, of course, were tactical dead ends. For example, the conventional wisdom on the Reservation was that getting the Sioux tribes of South Dakota together to do anything was a frustrating and often fruitless proposition. Thus, it was probably not worth the effort to try to form an alliance on the license plates issue. Even so, the tactics that did seem to be accomplishing something were supported by different groups within the Tribe or agents of the Tribe, each of which had their own priorities and tactical opinions. The Council, the attorneys, the President, the members of the Tribe and the Transportation Department were all

advancing the cause of license plates by passing resolutions, formulating strategies or simply licensing their vehicles. But, there was no coherence to the advances and there was no overarching decision maker who could lend coherence to the whole. Wisecarver wondered whether this was a problem she had to live with—whether the Sioux were culturally and historically predisposed not to accept centralized authority or government.¹⁸ Nevertheless, she found it frustrating to be nominally in charge of the Transportation Department and responsible for the implementation of vehicle licensing while others were acting on their own and with different goals and aims. She was not soon relieved of her frustration.

During the Tribal Council meeting of May 6, 1986, the Council and attorneys settled on a strategy to “protect its sovereignty, yet avoid confrontation with the Governor of South Dakota,” and announced it in a press release. The Council imposed a moratorium on impoundments, directed Hobbs, Straus to introduce Congressional and state legislation recognizing plates, committed itself to amending the ordinance and waived fees for 1986. The Council also directed the President to work out recognition agreements with the counties and work on a public relations campaign “including press conferences and a letter to Governor Janklow.” The Council also recommended to Al Dreamer, Sr., a Councilman arrested for having only tribal plates, and to all others arrested that they attempt to have their cases dismissed out of court. Finally, the press release advised tribal members to have state license plates when driving off the reservation.

It seemed to Wisecarver that the Council had backed down. The transition from the Cummings Administration to the American Horse Administration had weakened the political will behind the issue of license plates, and when confrontation came with the Governor, the Council had changed strategies rather than continue along the path she and President Cummings had followed. Wisecarver had doubts about the new strategy. It was not clear whether

¹⁸ See Hyde, George, *Red Cloud's Folk: A History of the Oglala Sioux Indians* (Norman: University of Oklahoma Press, 1975) for a discussion of Oglala patterns of political organization.

the legislative and public relations strategies would work, and it seemed they would require substantial effort and resources—political commitment and financial resources had not yet been made available by the new Council, and Wisecarver was skeptical they would be. Wisecarver's experience with the county governments led her to believe that they would follow the Governor's lead, and she was disheartened that the Council had recommended that tribal members register their vehicles in both jurisdictions.

During the exchange of legal briefs and memoranda between Hobbs, Straus and the State, Wisecarver and one of the law firm's junior partners began drafting a federal bill that would allow all tribes and Alaska natives to work with the federal Transportation Department including the Federal Highway Administration and the Federal Aviation Administration. But, more importantly, it would also force state recognition of any tribe's license plates, driver's licenses, and other regulatory laws relating to transportation. Wisecarver lobbied extensively with other tribes throughout the United States and received resolutions of support from the National Congress of American Indians, the National Tribal Chairman's Association, and the National Tribal Roads Board. The bill was sent to Senator Tom Daschle in 1987 and was placed on the agenda of the Senate Select Committee on Indian Affairs to be heard in 1988. In the intervening months, Wisecarver was removed as Transportation Director and the bill was not pursued.

As she contemplated the future, the new strategy and the prospects for her funding (the ANA grant still had 18 month's worth of money remaining), she asked herself questions like the ones Bob Gay had after his third ticket. What could have been done differently? Why had the Governor reversed himself? What opportunities had they failed to tap? Why did it seem to her that the plates issue had spun out of her control? Was she a victim of weak-willed politicians or had she done something wrong? Furthermore, what should she do now? How could she get recognition for the Tribe's plates?

Exhibit A

The Red Lake Chippewa and Pine Ridge Reservations

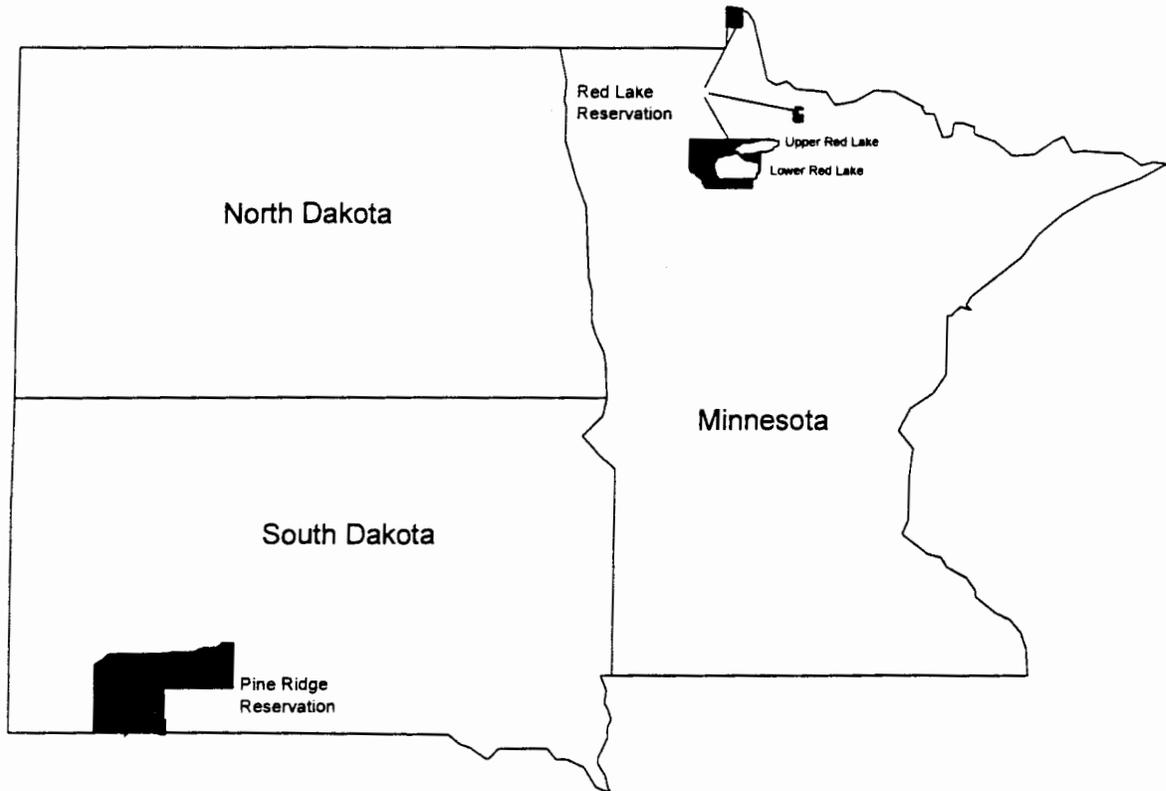


Exhibit B

The Roads and Highways of the Red Lake Chippewa Reservation

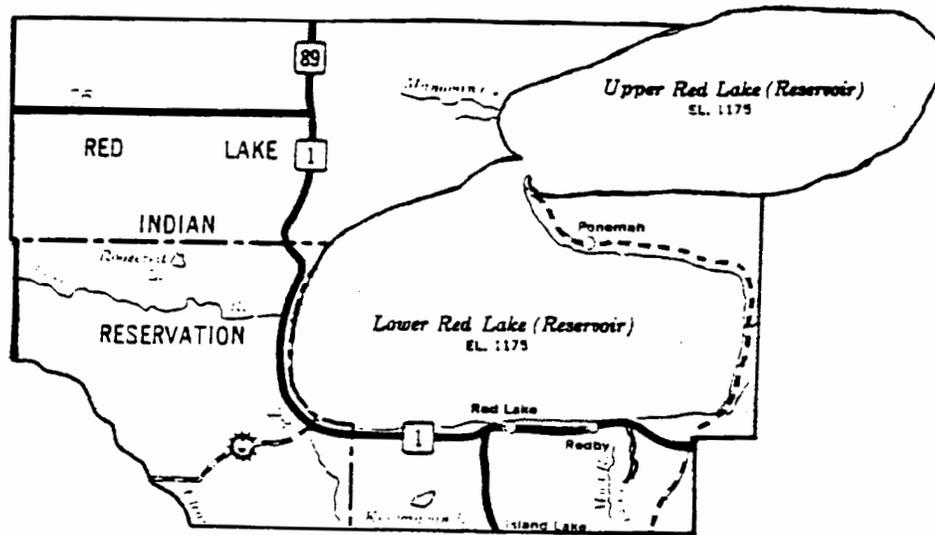
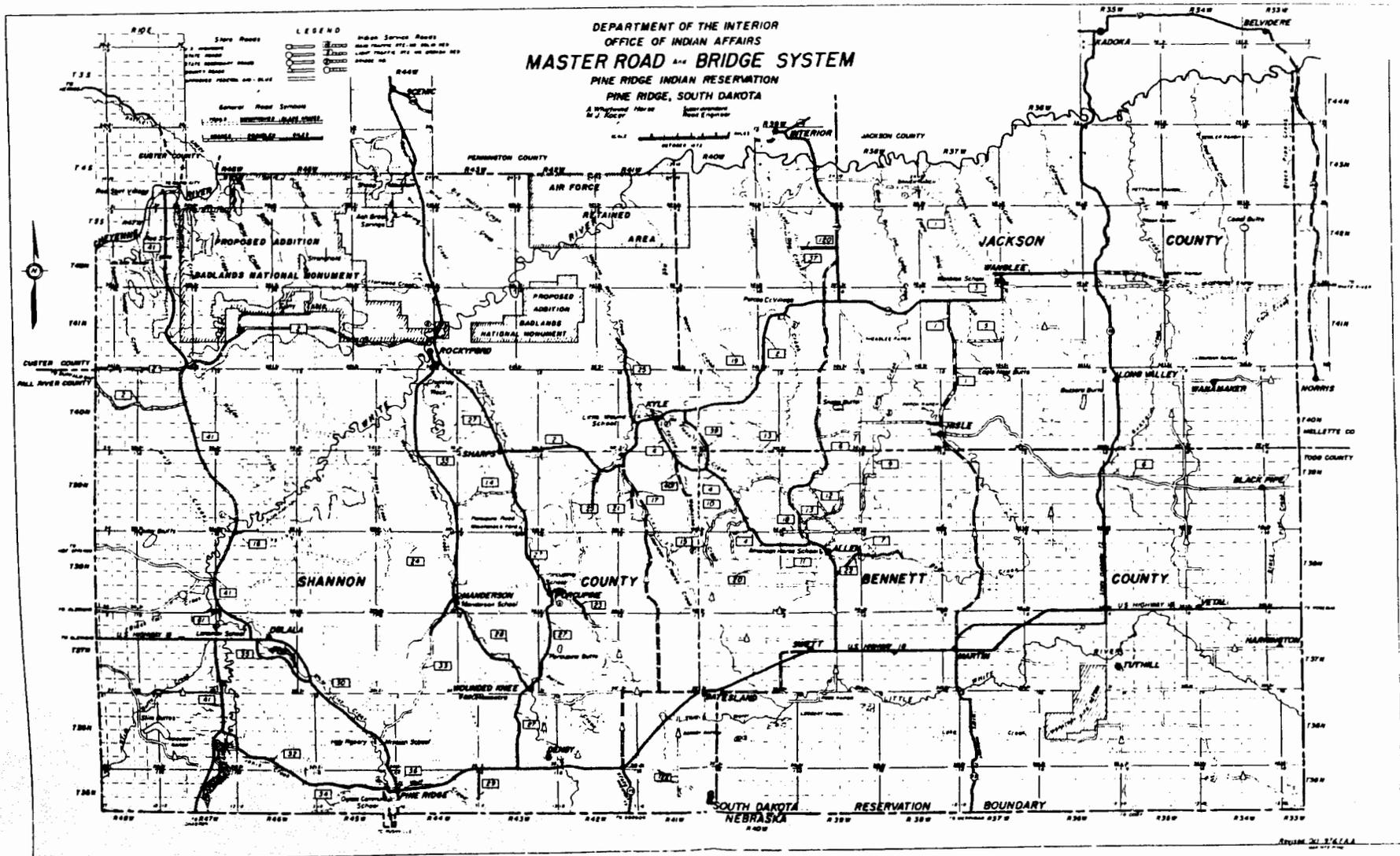


Exhibit C

The Roads and Highways of the Pine Ridge Reservation



Malcolm Wiener Center for Social Policy
John F. Kennedy School of Government
Harvard University

**Oglala Sioux License Plates:
A Tribal Manager Tries to Assert Tribal Sovereignty**

Epilogue

A Teaching Case Study in Tribal Management for
Oglala Lakota College

by Jonathan Taylor

Harvard Project on
American Indian Economic Development

July 1996

Epilogue

In the time following the Council's decision not to proceed with the caravan, there were not many changes in the Tribe's general strategy and events seemed to follow Charmaine Wisecarver's gloomy expectations of May 1986.

Initially there were several efforts to amend the ordinance, but the amendments had no major impact on the course of events. There were amendments to add provisions for vanity plates and to make the transportation ordinance more consistent with tribal law. An implied consent ordinance would have strengthened many of the Tribe's laws by asserting that whenever non-members came onto the reservation, they implicitly agreed to abide by Oglala Sioux law. These amendments were the final attempts to complete the ordinance and by the fall of 1986, they had been overshadowed by other strategic actions spelled out in the Council's May 6, 1986, press release.

By the end of May, the Tribe had embarked on its campaign for federal and state legislation to force recognition of tribal plates. Wisecarver wrote to Jerry Straus in Washington suggesting legislation that would accomplish two major policy changes that would make her job easier. First, she wanted the authority to work directly with the Federal Department of Transportation instead of having to go through the State. Second, she wanted Congress to declare all reservation roads to be under tribal jurisdiction. The attorneys responded by lobbying Senator Abdnor for legislation amending Public Law 93-638 to encompass construction projects administered by the Department of the Interior but funded by other departments.¹⁹ This proposal would have made it possible for the Tribe to take over all of the Indian Reservation Roads program funds and responsibilities. The attorneys continued to push these issues on Capitol Hill, and nearly a year later President American Horse lobbied

¹⁹ PL 638, as it is known, allows Tribes to contract for certain federal government functions. When they do so, they receive the allocation for that function and the performance of that function becomes treated as a receivable product or service in a Federal contract. In this case, expanding the jurisdiction of PL 638 to include programs funded by other departments would enable the Tribe to contract the federal portion of the Reservation's road maintenance expenses.

Abdnor's replacement, now-Senator Daschle, on these same issues, but no legislation materialized.

The Tribe was just as unfortunate in obtaining state-level acceptance of its jurisdiction over roads and licensing. In the summer of 1986 the Tribe and their attorneys continued to press Governor Janklow for a moratorium on arrests and for mutual recognition of plates. Appeals to logic, legal precedent and negotiation went unheeded. The Commissioners of Pennington County were similarly uncooperative; they rejected an offer by Wisecarver to meet and discuss license plates, claiming it was a state issue. By the end of the summer the issue became moot since a state election campaign was in full swing. The Tribe could only approach candidate George S. Mickelson for his opinion, and he was noncommittal.

After the gubernatorial election, however, the Tribe put pressure on newly-elected Governor Mickelson to make his views known and to support the Tribe. About the time of the inauguration, Wisecarver had a letter published in the *Lakota Times*, one of the more widely read papers in Indian Country. She pointed out that license plate money was going to the state and then spent by counties which were not spending it on roads on Indian Reservations. "In Shannon County, [the county comprising the major portion of the Pine Ridge Reservation,] they don't know which roads they have [jurisdiction over]."²⁰ She also offered an olive branch to the governor by pointing out that the Tribal Council had waived licensing fees until the new governor and legislature were installed. She also hinted that the Tribe *would* respond if the governor did not. "We don't think the people of South Dakota want their tax dollars to pay for a lengthy and costly court case on our license plates when the precedent has been set in previous cases."²¹

²⁰ Wisecarver, Charmaine, "OST to Issue License Plates, Offers Hand of Friendship to State," Letter to *The Lakota Times*, Jan. 1, 1987.

²¹ *Ibid.*

The President of the Tribe also pressured the new Governor. He met with Mickelson early in the new year and explained the legal precedents under which the Governor would be making his decision. He requested a moratorium on arrests until the State and the Tribe had come to some resolution on reciprocity. To forestall any attempt by the Governor to pass the issue to the legislature, President American Horse made clear his opposition to a bill put forward by Senator Short Bull, the District's representative in the South Dakota Senate. Short Bull had sponsored a bill that would increase the flow of resources to the reservations, but Wisecarver and others felt it gave too much sovereignty to the State and to the county governments. The bill did not address the issue of license plates, but went so far as to recognize the authority of county governments on the reservations. According to Wisecarver, who testified against the bill, Short Bull "stated that it was to *prevent* tribes from issuing their own license plates."

The lobbying efforts by Wisecarver and American Horse had little effect. The new Attorney General asked Wisecarver for clarification of a few legal points and inquired about the Tribe's plans for Bennett County where there was a great deal of checkerboard jurisdiction. But, these communications were little more than formalities. In late April of 1987 the Governor wrote to the Tribe that "there was no basis under South Dakota law for the State of South Dakota to recognize the tribal plates and agree to a moratorium at the present time." His intention was to wait until the outcome of the *Means* case, a case involving a tribal member arrested for not having South Dakota plates.

The *Means* Case

Russell Means was a long-time proponent of direct action as method of accelerating political change. He had been centrally involved for years in the American Indian Movement, a radical group of urban and reservation Indians from around the US, whose power peaked in the 1970's. Means had been involved in Wounded Knee II, one of the more vio-

lent episodes of the Movement's history, and his name had become synonymous with the outspoken rage of liberal Native Americans. He had strenuously opposed State encroachments on tribal sovereignty and often opposed the OST government for not taking a hard line with the State. It was no surprise to Wisecarver that Means would appear in the newspapers soon after being issued license plates.

In the fall of 1986, Means was ticketed three times for having a vehicle not licensed by the State of South Dakota. Each time, he promised to challenge the constitutionality of the ticket, and each time, he was fined. The third time, his vehicle was impounded. The magistrates in the cases, unlike the judge presiding over Gay's dispute, found "a clear requirement in South Dakota law for state plates over tribal plates," and Means appealed the decisions.

When the first tribal members were arrested in the spring of 1986, Hobbs, Straus, Dean and Wilder warned the Tribe that it would not be a prudent legal strategy to defend the right of licensees to drive off the reservation. Instead, they suggested that the Tribe i) negotiate with the state first, and then, if that did not work, ii) fine a non-member residing on the reservation for not having OST plates. Because federal courts could not decide matters of state law unless a constitutional violation was found, Jerry Straus felt that going to federal court would be imprudent. Straus also felt that the burden of proof needed for a preliminary injunction or temporary restraining order was too great. This led him to recommend the Tribe negotiate first and then later, if necessary, create a suit where the Tribe had to defend its right to apply licensing regulations to non-members. Russell Means, if he had any awareness of this strategy, never intended to go along with it.

Means could not fund his appeal costs, so he approached the Native American Rights Fund (NARF) for support. The Native American Rights Fund underwrites legal actions and appeals that it considers will advance the sovereignty of tribes or the rights of Native Americans. Since Means's case concerned government-to-government relations and not personal

freedoms, NARF approached the Tribe's attorneys at Hobbs, Straus, Dean and Wilder to see if the Tribe supported going forward with the Means case and to determine if the Means case was the strongest option for advancing the Tribe's authority to license. President American Horse and Jerry Straus felt the Means case did not dovetail with their strategy well and told NARF so. NARF, in turn, decided not to take up the case and advised Russell Means to work with the Tribe on a case. Means was not receptive to the idea and continued with his appeal. Nothing came of it.

Reservation Politics

As the license plate issue continued without success, Wisecarver found herself dragged into a feud. Feuds can be common in tribal governments, and this particular dispute effectively disabled the Transportation Department and eventually doomed the license plates project.

In the early months of the Department's existence, Wisecarver enjoyed the support of President Newton Cummings. They shared a common vision of the project, and he was committed to supporting it with the Tribe's legal staff and with any political approval necessary to gain funding from the Administration for Native Americans. After the change in administration, however, the strong backing she had enjoyed under Cummings evaporated. President American Horse was not as aggressive when it came to tribal sovereignty, and the Tribal Council was wary of confrontation with the State and had doubts about taking the risk of riding in the caravan.

The lukewarm support Wisecarver received from members of the American Horse administration turned to open hostility late in 1987 when Wisecarver discovered that Anita Janis, the Tribal Treasurer, had been withholding funds from the Transportation Department. The ANA grant to the Tribe for the establishment of the Department and pursuit of the license plates project was divided into three sums of \$100,000, each to be spent during one

year of the grant. In late-1987 Wisecarver discovered that Janis had withheld \$25,000 of the Department's funds each year. Other than contacting the ANA office in Washington, D.C., she could not act on this knowledge until Harold Salway, the Fifth Member of the Tribe's Executive Committee, asked her if any money had been taken out. He told her that money had been missing from the accounts of several contract programs, and that he wanted documentation about the missing funds to take to the *Lakota Times*. Wisecarver gave him receipts and canceled checks. Shortly after the *Times* published the article, the Council offered her immunity from prosecution in exchange for testimony about the funds. Though worried about being fired, she went to the Council.

Instead of appearing with nine other program directors as she had been told she would be, there were only two others. She testified in front of five Council members, the press and the other two directors about the missing money, and the next day Janis fired her. Wisecarver had assumed that she was protected under the Oglala Sioux Tribe Personnel Ordinance, but apparently she was not. Ordinarily, an employee is fired through a grievance proceeding in which their case can be heard, but since the Treasurer was the only one with the authority to sign pay checks, she had *de facto* firing authority. Wisecarver approached the Personnel Committee and was told that she could not be fired by the Treasurer and that she should continue working. She worked eight weeks without pay and another program director "fired" by Janis worked four months without pay until officially reinstated.

Several weeks after being fired, Wisecarver received a call from Janis saying that the next month's funding had not arrived from Washington. Janis told her that the money had not been sent because Wisecarver had disclosed the missing money to the press. Wisecarver investigated and found that the real reason the money had not arrived was because the Treasurer's office had not sent in the previous month's financial report as required by the ANA. In the following month's Council Meeting, the Council heard and believed Janis' perspective on the discontinued funding, and Wisecarver was fired. (The Council does not have the power

to fire employees under the Personnel Ordinance, but Wisecarver had no recourse.) Soon thereafter, Wisecarver's deputy, the Acting Director, was fired and an associate of Janis' employed as Director. The following year, the ANA grant expired and the Council passed no resolution to fund the Department.

The Tribe did not pursue license plates vigorously thereafter. In 1991 the State of South Dakota created tribal license plates for all the tribes in the State. The plates had "South Dakota" printed at the top, the tribes' names at the bottom, and different logos and backgrounds depending on the tribe. Since that year, at least one tribal member using the state-sanctioned plates has been pulled over for not having South Dakota plates.