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Indians - Reservations - Effect of Later Congressional Acts on Act Establishing Reservation Boundaries

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Reservations are usually bleak areas originally granted to the Indians because they were isolated from the white community and because the white community did not want the lands thus made available to the Indians.[50] Indian response to those ghetto-like conditions has been to desert reservation life. Nearly one-third of America's Indian population had deserted the reservation by 1968. In part, migration has been implemented by federal programs which furnish relocation funds, but no post-vocational assistance is included. Often these Indians migrating to urban areas know nothing of the rudiments of city living, and Indians often experience difficulty finding employment.[51] Faced with such considerations, the court made the proper decision regarding general assistance benefits for off-reservation Indians from a sociological viewpoint.[52]

Since the decision rested heavily upon the language of the Snyder Act, the question arises whether the other provisions of the Snyder Act may be similarly applied. If this question may be answered affirmatively, Indians living off the reservation may receive assistance for education, relief of distress, conservation of health, industrial assistance and advancement, development of water supplies, employment of physicians, and suppression of liquor and drugs. While such a holding is desirable in light of the history of the affairs of the white man and the Indian, it may prove to cause a repeal or amendment of the Snyder Act to limit such benefits to the Indians because of real or alleged shortages of revenues. However, a debt is owed to the American Indian which has been ignored too long, and it is time that America began to repay the debt by providing these and other services to Indians, whether they live on or off the reservation.

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INDIANS—RESERVATIONS—EFFECT OF LATER CONGRESSIONAL ACTS ON ACT ESTABLISHING RESERVATION BOUNDARIES

Appellant, a municipal corporation, brought suit for a declaratory judgment asserting that the Congressional Act of 1910,[1] which allowed for allotment and sale of certain Fort Berthold Indian Res-

50. *See generally,* D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970) for a history of the creation of Indian reservations and the methods by which Indians were forced onto them.
51. Note, *Indians: Better Red Than Dead?*, 42 S. CAL. L. REV. 101, 118 (1969).
52. *See* Comment, 2 U.C.L.A. L. REV. 143 (1954).
1. Act of June 1, 1910, ch. 264, 36 Stat. 455.

ervation lands, did not change the boundaries of the North Dakota reservation, as established by the Congressional Act of 1891.[2] Appellant was attempting to retain criminal jurisdiction over Indians committing crimes in New Town, North Dakota. The case arose when the Solicitor for the Department of the Interior issued an opinion[3] concerning the effect of the Act of 1910 on the Act of 1891 which had established the Fort Berthold Indian Reservation. The Solicitor concluded, contrary to previous administrative practice and an earlier opinion of the Deputy Commissioner of Indian Affairs,[4] that the Act of 1910 had not altered the reservation boundaries which remained the same as those established by the Act of 1891; that no authority existed for the alteration of the boundaries by administrative practice; and that the City of New Town was within the exterior boundaries of the reservation, which is Indian Country for jurisdictional purposes.[5] The Eighth Circuit Court of Appeals affirmed the denial of New Town's application for a declaratory judgment[6] which would have allowed it jurisdiction over the Indians in New Town. The court declared the boundaries of the Fort Berthold Indian Reservation to be those established by the Act of 1891, unaltered by the Act of 1910. *New Town v. United States*, 454 F.2d 121 (8th Cir. 1972).

The land in question, originally part of an extensive area of land held by the Three Affiliated Tribes[7] by treaty,[8] was substantially diminished by several Executive Orders and Acts of Congress. Beginning in 1868 approximately 11,500,000 acres of land were taken from the Indians by Executive Orders for railroads and white settlers.[9] Government representatives drafted an agreement in 1886 by which the Fort Berthold Indians would cede approximately

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2. Act of March 3, 1891, ch. 543, 26 Stat. 989.

3. Opinion of the Solicitor, Department of the Interior, Memorandum M-36802, Mar. 13, 1970.

4. Letter from Deputy Commissioner of Indian Affairs to Director Aberdeen Area Office, July 31, 1962. [hereinafter referred to as Crow letter].

5. 18 U.S.C. § 1151 (1949) defines Indian Country as:
(a) "[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

6. Entered pursuant to an unreported opinion by Hon. George S. Register, Chief Judge of the U.S. District Court for the District of North Dakota.

7. Co-defendant, a corporate entity succeeding to the interests of the Arikara, Gros Ventre, and Mandan Tribes of Indians, was organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (1971).

8. Treaty of Fort Laramie, 11 Stat. 749 (1851). For general background see Fort Berthold Reservation v. United States, 390 F.2d 686, 688, 689 (Ct. Cl. 1968).

9. Exec. Order of August 18, 1868; April 12, 1870; July 13, 1880. Exec. Orders of April 12, 1870, and July 13, 1880, are found in United States Laws and Statutes 1 INDIAN AFFAIRS, LAW AND TREATIES, (1904). The Executive Orders are cited in Fort Berthold Indians v. United States, 71 Ct. Cl. 308, 337-40 (1930).

2,000,000 more acres for $800,000.[10] Congress ratified the 1886 agreement on March 3, 1891 with an important clause providing that after allotments were made to individual Indians the residue of the land "[s]hall be held by the said tribes of Indians as a reservation."[11]

The Act of 1910 was the next piece of legislation to affect this area of land. This Act directed the Secretary of the Interior to dispose of certain surplus lands in accordance with the general provisions of the homestead and townsite laws of the United States;[12] to cause allotment of a set number of acres north and east of the Missouri River to each member of the Tribes;[13] and to reserve from sale, allotment, or disposal all coal and mineral lands, lands for agency, school, and religious purposes, and timber and other lands.[14] It was provided that all lands included in the Act were still subject to Federal Jurisdiction through the application of federal laws such as the one prohibiting the introduction of intoxicants to Indian Country.[15] The Act concluded with the provision:

> [t]hat nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.[16]

A brief statement of several principles of Indian law seems appropriate at this point. It has long been established that Congress has plenary power over tribal property, relations, and funds.[17] This plenary power is not subject to review by the judiciary.[18] This enables Congress to dispose of tribal lands without the consent of the tribe,[19] and it exists despite the fact that Indians have been made citizens.[20] Through its plenary power Congress has guaranteed reservation Indians that they will be subject only to federal and tribal jurisdiction.[21]

Congressional Acts evidencing the exercise of this plenary power

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10. Cited in Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968).
11. Act of March 3, 1891, ch. 543 § 23, Art. 10, 26 Stat. 1032, 1035.
12. Act of June 1, 1910, ch. 264 §§ 1, 9, 36 Stat. 455, 457.
13. Act of June 1, 1910, ch. 264 § 2, 36 Stat. 455.
14. Act of June 1, 1910, ch. 264 §§ 1, 3, 5, 10, 36 Stat. 455, 456, 458.
15. Act of June 1, 1910, ch. 264, § 13, 36 Stat. 455, 458.
16. Act of June 1, 1910, ch. 264, § 14, 36 Stat. 455, 459.
17. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965); United States v. 21,250 Acres of Land, 161 F. Supp. 376 (W.D.N.Y. 1957); Bond v. Thom, 25 F. Supp. 157 (N.D. Okla. 1938), *aff'd sub nom.* United States v. Bond, 180 F.2d 504 (10th Cir. 1939).
18. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).
19. United States v. 21,250 Acres of Land, 161 F. Supp. 367, 379, (W.D.N.Y. 1957).
20. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 813 (E.D. Wash. 1965).
21. United States v. Minnesota, 95 F.2d 468 (8th Cir. 1938), *aff'd sub nom.* Minnesota v. United States, 305 U.S. 382 (1939); United States v. Calvard, 89 F.2d 312 (4th Cir. 1937); State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (1944). 18 U.S.C. § 1151 (1949). F. COHEN, HANDBOOK ON INDIAN LAW 310 (1945), 5 ARIZ. L. REV. 131 (1963).

have created problems for the courts when dealing with Indian lands, reservations, and jurisdiction. Courts have developed a number of principles to serve as guidelines for cases resolving jurisdictional conflicts involving the interpretation of such acts.[22] These principles indicate that unless Congress expressly declares a provision of a prior act to be superceded, it will remain in effect.

In deciding the instant case the court expressed primary reliance on three principles. The court stated:

> (1) When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. *United States v. Celestine*, 215 U.S. 278, 285 . . . (1909). Thus, there is no authority for an administrative alteration of boundaries as the Crow letter implies.
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> (2) The purpose to abrogate treaty rights of Indians is not to be lightly imputed to Congress. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 . . . (1968).
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> (3) The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation. *Seymour v. Superintendent*, 368 U.S. 351 . . . (1962).[23]

The principles of *United States v. Celestine* and *Menominee Tribe of Indians v. United States* are general principles of law for dealing with Indian reservation boundaries established by congressional acts. They clearly indicate the position the court will take in looking at the more specific principles of law stated in *Seymour v. Superintendent*.[24]

Like the present case, *Seymour* involved interpretation of the effect of a later act[25] upon an earlier Executive Order establishing

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22. Among these principles are: The intention to change Indian Rights is not to be lightly imputed to Congress. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968). The allotment of lands in severalty which are within the boundaries of an established reservation does not dis-establish a reservation or exclude the allotment from it. Toolsgah v. United States, 186 F.2d 93, 97 (10th Cir. 1950). Once a reservation has been established, all tracts within it remain a part of the reservation until separated therefrom by Congress. United States v. Celestine, 215 U.S. 278, 285 (1909). Statutes terminating Indian property rights should be construed narrowly, but the intention of Congress may not be ignored if it appears plainly in the statute. United States *ex rel.* Shoshone Indian Tribe v. Seaton, 248 F.2d 154, 155 (D.C. Cir. 1957). Uncertainties are to be construed favorably to the Indians rather than the government. United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938). The court must determine in each instance whether Congress has exercised guardianship over Indian property or whether it has exercised a right of eminent domain. Klamath and Modoc Tribes v. United States, 436 F.2d 1008, 2015 (Ct. Cl. 1971). Administrative interpretation of an act is not entitled to controlling weight when disputes arise. Lafferty v. State *ex rel.* Jameson, 80 S.D. 411, 125 N.W.2d 171, 174 (1963). An interpretation by a later Congress of the intent of earlier legislation does not control the meaning of such legislation. Rainwater v. United States, 356 U.S. 590, 593 (1958). *See also* S.E.C. v. Capital Gains Research Bureau, 375 U.S. 180, 199, 200 (1963); United States v. Philadelphia Nat'l. Bank, 374 U.S. 321, 348, 349 (1963).

23. New Town v. United States, 454 F.2d 121, 125 (8th Cir. 1972).

24. Seymour v. Superintendent, 368 U.S. 351 (1962).

25. Act of March 22, 1906, ch. 1126, 34 Stat. 80 [hereinafter referred to as Act of

the reservation.[26] The Supreme Court ruled that the Act of 1906 did not change the reservation boundaries, and that the land remained Indian Country[27] for jurisdictional purposes:

> The Act did no more than open the way for non-Indian settlers to own land *on the reservation* in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards. [Emphasis added].[28]

There are many important similarities between the effect of the Act of 1906 on the Colville Reservation and the effect of the Act of 1910 on the Fort Berthold Reservation.[29] The Act of 1910 contains affirmative terms which serve as an indication of congressional intent to preserve the reservation status throughout the entire area deemed a reservation by the Act of 1891. In the Act of 1910 the Secretary of the Interior is authorized to reserve from allotment to individual Indians any lands with coal or other mineral despoits; all tracts valuable for power or reservoir sites;[31] all timber lands;[32] and areas for parks, schools and other public purposes; no compensation being paid for these areas. These affirmative propositions reinforce the decision in *New Town,* independently of *Seymour* and demonstrate the importance of interpreting the intention of congressional acts by viewing them in their entirety.

There are few decisions conflicting with *New Town* and *Seymour* although a few South Dakota cases have reached a different result.[34] However these cases are distinguishable as they involve acts with language expressly construed to diminish the lands of Indian reservations.[35] It may also be noted that the effect of these two cases

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1906]. This statute concerned the opening of the southern half of the Colville Indian Reservation to sale and settlement under the general homestead and townsite laws.

26. Executive Order of President Grant, 1872, noted in 1 KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 916 (2d ed. 1904).

27. 18 U.S.C. §§ 1151, 1152, 1153 (1971).

28. Seymour v. Superintendent, 368 U.S. 351, 356 (1962).

29. Both the Act of March 22, 1906, ch. 1126, 34 Stat. 80, and Act of June 1, 1910, ch. 264, 36 Stat. 455 provide for: 1. Allotment to members of the tribes and sale to outsiders of surplus lands not needed for allotments or reserves (1906 Act, §§ 2, 3; 1910 Act, §§ 2, 8); 2. Appraisal of the lands and disposition at an appraised price under the general homestead laws of the United States (1906 Act, §§ 3, 4; 1910 Act, §§ 7, 8, 9); 3. Proceeds of the sale to be deposited in the United States treasury for the benefit of the Indians (1906 Act, § 6; 1910 Act, § 11); 4. The open area to be considered Indian Country for the purpose of application of Indian liquor laws (1906 Act, § 13 *as amended;* 1910 Act § 13); 5. The United States not to be bound to secure purchases but merely to act as a trustee for the Indians (1906 Act, § 9; 1910 Act, 14).

30. Act of June 1, 1910, ch. 264, § 1, 36 Stat. 455.

31. Act of June 1, 1910, ch. 264, § 5, 36 Stat. 455, 456.

32. Act of June 1, 1910, ch. 264, § 10, 36 Stat. 455, 458.

33. Act of June 1, 1910, ch. 264, § 6, 36 Stat. 455, 456.

34. State *ex rel.* Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959); State *ex rel.* Erickson, 141 N.W.2d 1 (S.D. 1966); Lafferty v. State *ex rel.* Jameson, 80 S.D. 411, 125 N.W.2d 171 (1963); State v. Barnes, 137 N.W.2d 683 (S.D. 1965).

35. Act of May 27, 1910, ch. 257, 36 Stat. 440 was interpreted in State *ex rel.* Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959), and State *ex rel.* Swift v.

on South Dakota's jurisdiction over Indians has been questioned by Judge Lay of the Court of Appeals for the Eighth Circuit in his dissenting opinion in *United States ex rel. Miner v. Erickson*,[36] and in two recent South Dakota cases the state court has not followed this authority, but recognized instead the line of cases represented by the *Seymour* and *New Town* decisions.[37]

Later Congressional and administrative acts are of little assistance in the interpretation of Congressional intent with regard to Fort Berthold. The later acts are plagued with inconsistencies. Legislative and administrative acts immediately following the Act of 1910 reaffirm the reservation boundaries as being those established by the Act of 1891.[38] In 1916 inconsistencies began to develop in legislative drafts and the reservation was sometimes referred to as the "former" or "formerly" Fort Berthold Reservation.[39] The court in *New Town* remarked that the inconsistencies within later acts and statutes prevent finding any clear intent of Congress to diminish the Fort Berthold Reservation.[40]

Administrative interpretation of the boundaries of the reservation are equally unreliable in interpreting the Act of 1910. Similar to Congressional interpretation, administrative interpretation contemporaneous with the Act of 1910 viewed the boundaries of the reservation as preserved.[41] The inconsistencies of later administrative opinions were one reason the City of New Town initiated this law suit, as a review of the Crow letter[42] and the Solicitor's opinion[43] will verify.

The *New Town* case may be exemplary of the problems which will be raised in actions brought to determine reservation boundaries.

Erickson, 141 N.W.2d 1 (S.D. 1966) as diminishing the Pine Ridge Reservation. But they may be distinguished since the Act contained the provision: "[T]hat any Indians to whom allotments have been made on the tract *to be ceded* may . . . elect to do so before said lands are offered *for sale*, relinquish same and select allotments in lieu thereof on the *diminished reservations* . . ." Act of May 27, 1910, ch. 257, § 1, 36 Stat. 440 (emphasis added).

36. United States *ex rel.* Miner v. Erickson, 428 F.2d 623, 637 (8th Cir. 1970).

37. South Dakota v. Congram, (8th Cir., February 10, 1972); South Dakota v. Molash, (8th Cir., February 10, 1971).

38. *E.g.*, Act of May 24, 1924, ch. 180, 43 Stat. 139, "[L]ands within the Fort Berthold Indian Reservation"; Act of August 3, 1914, ch. 224, 38 Stat. 681, "[L]ands in the Fort Berthold Indian Reservation, North Dakota."

39. *See, e.g.*, Act of October 29, 1949, ch. 790, 63 Stat. 1026; Act of May 10, 1920, ch. 178, 41 Stat. 595; Act of March 3, 1917, ch. 168, 39 Stat. 1131; Act of May 18, 1916, ch. 125, 39 Stat. 123, 144.

40. New Town v. United States, 454 F.2d 121, 125, 126 (8th Cir. 1972).

41. *E.g.*, Presidential Proclamation, September 17, 1915, 39 Stat. 1748. "[A]ll the lands in the Fort Berthold Indian Reservation. 1912 REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at 60; [W]ithin that part of the reservation lying North and East of the river"; 1910 REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS at 31; Presidential Proclamation, June 29, 1911, 37 Stat. 1693.

42. Letter of Deputy Commissioner of Indian Affairs to Director Aberdeen Area Office, July 31, 1962.

43. Opinion of the Solicitor, Department of the Interior, Memorandum M-36802, Mar. 13, 1970.

More disputes on jurisdiction are likely as attorneys and their Indian clients become increasingly aware that administrative opinions and practices do not establish Indian reservation boundaries and jurisdiction. The *New Town* and *Seymour* decisions provide the courts with more definite and valuable guidelines to follow in interpreting the effect of conflicting statutes.

Few congressional acts and few Indian cases are so identical in fact and substance as to allow universal application of the rationale of the *New Town* case. When applicable, the result may present very real problems for cities and towns caught in a jurisdictional web hampering local law enforcement, credit and collection of debts, taxes and special assessments, and zoning. Congressional separation of the town from the reservation presents a partial solution,[44] but the effect will be checkerboard jurisdiction with obvious conflicts.[45] However, few legal or policy arguments can be made in favor of "bending" statutory interpretation to absolve or avoid such conflicts. Indians have not had a history of sophisticated use of the American legal system. The Three Affiliated Tribes have already lost 13,500,000 acres of land that they originally held by treaties.[46] In return they have been given the guarantee of a Federal reservation and Federal jurisdiction.[47] They should not lose these rights simply because it would be more convenient for nearby municipalities.

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44. This was proposed as a partial solution to the problems of local law enforcement in Parker, Arizona. Parker, like New Town, is a largely non-Indian community which grew on the Colville Indian Reservation and was determined to be in Indian Country in Seymour v. Superintendent, 368 U.S. 351 (1962). Non-Indians committing major crimes in Parker are subject to local jurisdiction while Indians are subject to Federal jurisdiction exclusively for such crimes and probably for misdemeanors as well. Congressional separation of Parker and New Town from the reservations would eliminate these distinctions and the very real problem they create in local law enforcement. 5 ARIZ. L. REV. 131, 134 (1963).

45. *See, e.g.*, State v. Barnes, 137 N.W.2d 683 (S.D. 1965). This case is similar to the present case as it arose on a motion to determine criminal jurisdiction. A murder of an Indian by a non-Indian took place on a road between two tracts of land over which there was a dispute as to derivation of title. The Supreme Court of South Dakota reversed a circuit court and found that the locus of the crime, although formerly within the boundaries of the Cheyenne River Reservation, was not restored to the reservation by the Indian Reorganization Act of 1934 and therefore was not Indian Country subject to exclusive Federal jurisdiction. For law enforcement officers the perplexity of the situation may be seen as almost necessitating their consulting a map with Federal, state, and local jurisdiction represented, if there could possibly be agreement on their respective extent, before attempting to fulfill any part of their duties.

46. Fort Berthold Indian Reservation v. United States, 390 F.2d 686, 689 (Ct. Cl. 1968).

47. Act of March 3, 1891, ch. 593, § 23, Art. 10, 26 Stat. 989, 1035; United States v. Minnesota, 95 F.2d 468 (8th Cir. 1938), *aff'd sub nom.* Minnesota v. United States, 305 U.S. 382 (1939); United States v. Calvard, 89 F.2d 312 (4th Cir. 1937); State v. Jackson, 218 Minn. 429, 16 N.W.2d 752 (1944). 18 U.S.C. §§ 1151 (1949) *et seq.*; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 310 (1945); 5 ARIZ. L. REV. 131 (1963).