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Indians - Reservations - Jurisdictional Effect of Surplus Land Statute upon Traditional Boundaries of an Indian Reservation

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RECENT CASES

INDIANS—RESERVATIONS—JURISDICTIONAL EFFECT OF SURPLUS LAND STATUTE UPON TRADITIONAL BOUNDARIES OF AN INDIAN RESERVATION.

Plaintiff was an enrolled member of the Sisseton-Wahpeton Sioux Indian Tribe. Her children, also members of the Tribe, were placed in foster homes by order of the defendant district county court.[1] Approximately one-half of the incidents leading to the court ordered placement occurred on non-Indian patented lands within the original boundaries of the Lake Traverse Indian Reservation.[2] Plaintiff petitioned the Circuit Court of Roberts County for a Writ of Habeas Corpus, alleging that the state lacked jurisdiction to issue the order because the incidents upon which it was based took place in "Indian country."[3] The writ was denied,[4] and the plaintiff appealed to the South Dakota Supreme Court. The supreme court ruled[5] that the unallotted lands[6] of the reservation had been sold to the United States by the Congressional Act of 1891.[7] The land

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1. The plaintiff had placed one child for adoption and the other child was separated from her through neglect and dependency proceedings in the District County Court for the Tenth Judicial District of South Dakota.

2. The Lake Traverse Indian Reservation (also known as the Sisseton-Wahpeton Indian Reservation) is located partly in northeastern South Dakota and partly in southeastern North Dakota. The reservation was created by the Treaty of February 19, 1867, with the Sisseton and Wahpeton Tribes, 15 Stat. 505. By the Act of March 3, 1891, ch. 543, 26 Stat. 989, 1035, the Sisseton-Wahpeton Tribe agreed to sell to the United States all the unallotted lands within the 1867 reservation boundaries.

3. 18 U.S.C. § 1151 (1970) 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.

4. Unpublished Opinion of September 26, 1972, the Honorable Philo Hall, Circuit Court of Roberts County of the State of South Dakota.

5. DeCoteau v. District County Ct. for Tenth Jud. Dist., 87 S.D. ——, 211 N.W.2d 843 (1973).

6. Unallotted lands are those lands originally in an Indian reservation which were *not* allotted to an Indian, or if they were so allotted at one time, such Indian title has since been extinguished. (Concepts of allotment are discussed in text accompanying notes 20-23 *infra*.) For jurisdictional purposes, the difficulty arises in determining whether these unalloted lands are within or without a reservation as the particular reservation is defined today.

7. Act of March 3, 1891, ch. 543, 26 Stat. 989, 1035 (hereinafter referred to as the Act of 1891). This Act ratified a previously negotiated agreement entered into in 1889 by the Sisseton-Wahpeton Sioux Indians and the United States. Article I of the Act provides:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby *cede, sell, relinquish,* and *convey* to the United States *all their claim, right, title, and interest* in and to *all the unallotted lands* within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

Id. at 1036 (emphasis added).

thus acquired by the United States was separated from the reservation and returned to the public domain, and could not be considered as "Indian country."[8] As a result the state of South Dakota was deemed capable of exercising jurisdiction over criminal and civil acts committed by Indians thereon.[9]

Less than two months later, the Court of Appeals for the Eighth Circuit overruled a previous case when it held in a separate action that the Act of 1891 had no effect on the Lake Traverse Indian Reservation boundaries.[10] Consequently the unallotted lands within these boundaries were found to be "Indian country,"[11] and thus the state had no jurisdiction to try Indians for criminal acts committed therein.

The two cases were consolidated on appeal to the United States Supreme Court in order to resolve the conflict and to ascertain the correct status of unallotted lands within the Lake Traverse Indian Reservation.[12] In affirming the state court and reversing the circuit court, the Supreme Court *held* that the Lake Traverse Indian Reservation was terminated by the Act of 1891, when the unallotted lands were returned to the public domain, and that since that time the lands have not retained reservation status. Therefore, state courts have jurisdiction over Indian conduct occurring on non-Indian lands within the original reservation boundaries. *DeCoteau v. District County Court For Tenth Judicial District,* 420 U.S. 425 (1975).

In recent years, both federal and state courts have been faced with the difficult task of determining the effect of particular surplus land statutes[13] upon the original boundaries of Indian reser-

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8. "Indian country" is defined at note 3 *supra.*

9. Jurisdiction over Indian conduct is divided between the tribe, the federal government, and the states. To aid in determining which body is to have jurisdiction in a particular situation, Congress in 1948 enacted the definition of "Indian country". See note 3 *supra.* Under this definition if the lands in question are within a continuing reservation, jurisdiction is in the tribe and the federal government. 18 U.S.C. § 1151(a) (1970). On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the state, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c) (1970). DeCoteau v. District County Ct. for Tenth Jud. Dist., 420 U.S 425, 427 n.2 (1975). For a general discussion of criminal and civil jurisdiction over Indians, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 358-82 (GPO ed. 1945).

10. United States *ex rel.* Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973). Appellants were ten enrolled members of the Sisseton-Wahpeton Sioux Indian Tribe imprisoned in the state penitentiary of South Dakota. They instituted habeas corpus proceedings against the warden of the penitentiary, asserting that the state lacked jurisdiction to prosecute them for crimes committed on non-Indian lands within the 1867 boundaries of the Lake Traverse Indian Reservation, because such lands remained "Indian country" under 18 U.S.C. § 1151 (1970).

The result reached in this case expressly overruled DeMarrias v. State of South Dakota, 319 F.2d 845 (8th Cir. 1963). The reservation boundaries had been questioned in earlier litigation also: DeMarrias v. State of South Dakota, 206 F. Supp. 549 (D.S.D. 1962); State v. DeMarrias, 79 S.D. 1, 107 N.W.2d 255 (1961), *cert. denied* 368 U.S. 844; Application of DeMarrias, 77 S.D. 294, 91 N.W.2d 480 (1958).

11. "Indian country" is defined at note 3 *supra.*

12. *Cert. granted,* 417 U.S. 929 (1974).

13. As used herein, the term "surplus land statutes" refers to *all* types of congressional acts involving the sale of, or the opening up for homesteading of, Indian lands or surplus

vations.[14] The issue in these cases has *not* been who has jurisdiction over lands (Indian or non-Indian lands) which are definitely within the geographical borders of an Indian reservation.[15] Rather, the cases represent an attempt to clarify the jurisdictional conflict that arises when the actual boundaries of a reservation are in doubt—in doubt because unallotted Indian lands within the original reservation boundaries were directly opened to homesteading or sold to the United States for such purpose. Under these surplus land statutes, two drastically different results (at least as far as reservation boundaries are concerned) are possible. First, the reservation boundaries may remain the same, the only change wrought by the statute being in the total Indian-held acreage within the reservation boundaries.[16] The second possible result is that the reservation boundaries are geographically diminished to include only those lands allotted to the Indians. All unallotted lands sold to the United States or opened to homesteading directly are no longer "Indian country" for jurisdictional purposes.[17] The difficulty facing the courts is in deciding which of these two possible effects a particular statute had on a particular reservation's boundaries. Compounding this difficult determination is the dissimilarity of the language used in the various surplus land statutes enacted by Congress.

Surplus land statutes were not the first means employed by the United States to obtain land from the American Indian.[18] Prior to 1880, by treaty or agreement establishing a reservation, an Indian tribe often agreed to outright cession of certain lands to the United States in return for a sum certain consideration.[19] This pattern of outright cession was altered by the passage of the General Allotment Act of 1887.[20] This Act provided that each Indian residing with-

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lands after all Indians on a particular reservation have received their prescribed allotments. A complete list of such statutes enacted by Congress between 1887 and 1913 is available from the National Indian Law Library, 1506 Broadway, Boulder, Colorado 80302.

14. *See, e.g.*, New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Rosebud Sioux Tribe v. Kneip, 375 F. Supp. 1065 (D.S.D. 1974); Cook v. State, ——S.D.——, 215 N.W.2d 832 (1974); State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972).

15. The state is without jurisdiction in these areas, under the ruling in Kills Plenty v. United States, 133 F.2d 292, 294 (8th Cir. 1943). The rule was later codified in 18 U.S.C. § 1151 (1970). *See* the discussion in note 9 *supra*.

16. This is the position most favorable to, and usually advanced by, Indian tribes. *See, e.g.*, Seymour v. Superintendent, 368 U.S. 351 (1962); United States *ex. rel.* Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972).

17. This is a position taken by many of the states, since the effect would be to give them jurisdiction over the surplus lands of many of the various reservations. *See, e.g.*, Cook v. Parkinson, 396 F. Supp. 473 (D.S.D. 1975); State v. Williamson, ——S.D.——, 211 N.W.2d 182 (1973); State v. Moss, 471 P.2d 333 (Wyo. 1970).

18. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 294, 334-36 (GPO ed. 1945).

19. *Id.* at 334 n.521.

20. Act of February 8, 1887, ch. 119, 24 Stat. 388, *as amended* by the Act of May 8, 1906, ch. 2348, 34 Stat. 182. The Act, also known as the Dawes Act, was the impetus behind Congress passing surplus land statutes in the next several decades. It was hoped that tribal ownership of land could be eliminated and that Indians would become integrated with the Whites settling on the unalloted lands within the reservation. For an excellent analysis of the rationale and effect of the General Allotment Act, *see* D. OTIS, THE DAWES

in an existing reservation was to receive a specific allotment of land therein.[21] The Act further provided for the purchase and release of that portion of the reservation not allotted to the Indians—in other words, the sale or opening up of the surplus lands.[22] This was to be done at the discretion of the President and ratified by Congressional Act.[23]

The surplus land statutes took several different forms, based upon the different operative language used in each, and the method of payment employed in the various acts.[24] In several acts[25] it was provided that the Indian tribe agreed to "cede, sell, relinquish, and convey" the land to the United States for a sum certain consideration. The lands were then distributed to non-Indian homesteaders. In other surplus lands acts,[26] the terms "cede, grant and relinquish" were used to describe the transfer, but in these acts the United States was to act as a trustee of the proceeds received from non-Indian homesteaders on the lands, instead of purchasing the lands outright from the tribes. In a third type of surplus land acts,[27] the Secretary of the Interior was authorized "to sell and dispose of all the surplus unallotted and unreserved lands." Here again, the United States did not purchase the lands outright, but instead acted as trustee of the proceeds as they were received from individual non-Indian buyers. The lands involved in the fourth category were declared "subject to settlement, entry, and purchase."[28]

On three separate occasions since 1962, the United States Supreme Court has been asked to determine the jurisdictional consequences of particular surplus land statutes.[29] In *Seymour v. Superintendent,*[30] the Court ruled that the Congressional Act of 1906,[31]

ACT AND THE ALLOTMENT OF INDIAN LANDS (1973); *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 78-79, 207-17 (GPO ed. 1945).

21. Act of February 8, 1887, ch. 119, § 1, 24 Stat. 388.

22. Act of February 8, 1887, ch. 119, § 5, 24 Stat. 388, 389.

23. *Id.*

24. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 294, 334 (GPO ed. 1945); Sonosky, *State Jurisdiction over Indians in Indian Country,* 48 N.D.L. REV. 551, 553 (1972). *See also* Comment, *Criminal Jurisdiction Over Non-Trust Lands Within The Limits of Indian Reservations,* 9 WILLIAMETTE L.J. 288, 292 (1973).

25. *E.g.,* Lake Traverse Reservation, Act of March 3, 1891, ch. 543, 26 Stat. 989, 1035, *construed in* DeCoteau v. District County Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975); Yankton Sioux Reservation, Act of August 15, 1894, ch. 290, 28 Stat. 286, *construed in* State v. Williamson, ——S.D.——, 211 N.W.2d 182 (1973).

26. *E.g.,* Devils Lake, North Dakota, Act of April 27, 1904, ch. 1620, 33 Stat. 319; Rosebud Sioux Reservation, Act of April 23, 1904, ch. 1484, 33 Stat. 254, *construed in* Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975).

27. *E.g.,* Fort Berthold Reservation, Act of June 1, 1910, ch. 264, 36 Stat. 455, *construed in* New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Rosebud Sioux Reservation, Act of May 30, 1910, ch. 260, 36 Stat. 448, *construed in* Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975); Cheyenne River and Standing Rock Reservations, Act of May 29, 1908, ch. 218, 35 Stat. 460, *construed in* United States *ex. rel.* Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

28. *E.g.,* Klamath River Reservation, Act of June 17, 1892, ch. 120, 27 Stat. 52, *construed in* Mattz v. Arnett, 412 U.S. 481 (1973).

29. DeCoteau v. District County Ct for Tenth Jud. Dist., 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962).

30. 368 U.S. 351 (1962).

31. Act of March 22, 1906, ch. 1126, 34 Stat. 80. This Act opened the "South Half" of

which opened all unallotted lands in the diminished Colville Reservation[32] to homesteading, did not dissolve the reservation, and thus the state courts had no jurisdiction therein. The Court found that

> [t]he 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 . . . regarded as beneficial to the development of its wards.[33]

In *Seymour*, the Court adhered to the standard established in *United States v. Celestine*:[34] "When Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."[35] In *Seymour* there was no evidence that Congress had taken such action in passing the surplus land Act of 1906.[36]

The *Celestine* standard relied upon in *Seymour* was refined by the Supreme Court in *Mattz v. Arnett*,[37] wherein it stated that "[a] congressional determination to terminate [reservation status] must be expressed on the *face of the Act* or be clear from the *surrounding circumstances and legislative history*."[38] Utilizing this standard, the Court in *Mattz* reached the same result as it had in *Seymour*. The Congressional Act[39] opening the unallotted lands of the Indian reservation did not terminate that reservation, and it therefore remained "Indian country"[40] for jurisdictional purposes.[41] However, the *Mattz* Court utilized a much different approach than that used in *Seymour*. Whereas the Court in *Seymour* made no reference to the surrounding circumstances and legislative history of the 1906 Act,[42] the *Mattz* decision was replete with such information[43] concerning the surplus land act[44] there in issue. It is from this intensive analysis that the Court concluded that the Act of

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the Colville Indian Reservation in the state of Washington to homesteading, by authorizing the sale and disposition of the surplus of unallotted lands therein.

32. The Colville Reservation referred to in the Act of 1906 was called the diminished reservation or "South Half" because an earlier Act, the Act of July 1, 1892, ch. 140, 27 Stat. 62 had restored the "North Half" of the Colville Reservation to the public domain, but it had no effect on the "South Half."

33. 368 U.S. at 356.

34. 215 U.S. 278 (1909).

35. *Id.* at 285.

36. 368 U.S. at 359.

37. 412 U.S. 481 (1973).

38. *Id.* at 505 (emphasis added).

39. Act of June 17, 1892, ch. 120, 27 Stat. 52. The statute dealt with the Klamath Indian Reservation located in the state of California.

40. "Indian country" is defined at note 3 *supra*.

41. 412 U.S. at 506.

42. Act of March 22, 1906, ch. 1126, 34 Stat. 80.

43. The opinion began with a detailed history of the reservation and congressional action which had affected it. 412 U.S. at 485-94. The court then analyzed the surplus lands act in question and included an extensive examination of its congressional history to ascertain the congressional purpose in passing the Act. *Id.* at 496-504.

44. Act of June 17, 1892, ch. 120, 27 Stat. 52.

1892[45] did not employ clear termination language, and that it was not the congressional intent in passing the Act to terminate the reservation.[46]

Using the *Mattz* test, the *DeCoteau* Court found that the face of the Act, the surrounding circumstances, and the act's legislative history, conclusively showed that the Lake Traverse Indian Reservation was terminated in 1891.[47] Each of these three aspects of the *Mattz* test was extensively analyzed by the Court in *DeCoteau.*[48] The Court emphasized that the principles of statutory construction regarding termination of reservations established in *Celestine,* and those set forth in *Seymour* and *Mattz* remained binding.[49] The Court pointed out that adherence to these principles in ascertaining congressional purpose in passing a particular surplus land statute does *not* require uniformity of result.

> The Court of Appeals thought that a finding of termination here would be inconsistent with *Mattz* and *Seymour.* This is not so. We adhere without qualification to both the holdings and the reasoning of those decisions. But the gross differences between the facts of those cases and the facts here cannot be ignored.[50]

The Court distinguished *Mattz* on basically two grounds: the gross differences in the terms of the Acts involved and the differences in circumstances surrounding congressional passage of each Act.[51] *Seymour* was likewise distinguished because of the great difference in the terms of each of the respective Acts involved.[52]

The *DeCoteau* Court emphasized three very important points in

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45. *Id.*
46. 412 U.S. at 504.
47. 420 U.S. at 445.
48. (1) *The Face of the Act*—The Sisseton-Wahpeton agreement was only part of the Act of 1891. The Court not only discussed the articles of that agreement at length, but also compared and analyzed its wording in relation to the seven other agreements ratified in the Act. *Id.* at 436-42.

(2) *The Surrounding Circumstances*—The Court summarized the history of the reservation since its creation in the Treaty of February 19, 1867, with the Sisseton and Wahpeton Tribes, 15 Stat. 505. *Id.* at 431. It also discussed the temper of the time and the forces at work upon the reservation. *Id.* at 431-32. The negotiations with the tribe which led to the agreement and subsequent Act of 1891 are examined through contemporaneous documents of the sessions. *Id.* at 432-36.

(3) *The Legislative History*—The legislative history of the Act as it is set forth in the Congressional Record and Senate and House Committee Reports was extensively examined. *Id.* at 437-42. In this context, the Court also discussed the jurisdictional history of the area since the Act of 1891. *Id.* at 442-44.

49. *Id.* at 444. Some of these principles are: the Court will not lightly conclude that a reservation has been terminated, United States v. Celestine, 215 U.S. 278, 285 (1909); congressional intent must be clear to overcome the general rule that doubtful expressions are to be resolved in favor of the Indians, McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 174 (1973); congressional intent to terminate must be expressed on the face of the Act or be clear from the legislative history and surrounding circumstances, Mattz v. Arnett, 412 U.S. 481, 505 (1974); reservation status may survive the mere opening of a reservation to settlement, Seymour v. Superintendent, 368 U.S. 351 (1962).
50. 420 U.S. at 447.
51. *Id.* at 447-48.
52. *Id.* at 448-49.

reaching its decision. First, the results reached in cases involving reservation boundary disputes based on various surplus land statutes may vary. Secondly, the paramount concern in settling these disputes is ascertaining the congressional intent in passing the surplus land statute involved. Thirdly, congressional intent is ascertained only after an intensive analysis of the circumstances surrounding the passage of the Act and of legislative materials.[53] The importance of these considerations becomes apparent when contrasting decisions[54] rendered prior to *DeCoteau* with the case of *Rosebud Sioux Tribe v. Kneip*,[55] a post-*DeCoteau* decision. The earlier decisions realized the necessity of ascertaining congressional intent, but were ultimately decided through adherance to earlier case law, in which other considerations were deemed paramount, and little if any emphasis was placed on the legislative history or surrounding circumstances of the acts in question.[56] Exemplary of this approach was the 1972 decision by the Eighth Circuit in *New Town v. United States*,[57] in which the court ruled[58] that the Congressional Act of 1910[59] had no effect on the boundaries of the Fort Berthold Indian Reservation in North Dakota, therefore land considered subject to state jurisdiction for many years was deemed "Indian country."[60] The court emphasized the importance of ascertaining congressional intent in passing the Act of 1910, yet the decision did not cite any legislative history or specific examples of such intent.[61] The Court

53. *Id.* at 444-49.

54. Although there have been relevant decisions in other jurisdictions, *see, e.g.*, United States v. Washington, 496 F.2d 620 (9th Cir. 1974), *cert. denied* 419 U.S. 1032 (1975); Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); State v. Moss, 471 P.2d 333 (Wyo. 1970), most of the case law has been concentrated within the Eighth Circuit, and particularly in North and South Dakota. *See, e.g.*, United States *ex. rel.* Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), *rev'd*, 420 U.S. 425 (1975); New Town v. United States, 454 F.2d 121 (8th Cir. 1972); State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972); State *ex. rel.* Swift v. Erickson, 82 S.D. 60, 141 N.W.2d 1 (1966); State *ex. rel.* Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959); State v. Sauter, 48 S.D. 409, 205 N.W. 25 (1925).

55. 521 F.2d 87 (8th Cir. 1975). This case is discussed in the text accompanying notes 63-67 *infra*.

56. *See generally* the cases listed in note 54 *supra*.

57. 454 F.2d 121 (8th Cir. 1972); *accord*, United States *ex. rel.* Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973); United States *ex. rel.* Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). In *Condon*, the court concluded that "resort to the applicable contemporaneous and subsequent legislative history is not helpful." 478 F.2d at 688-89. Likewise, in United States *ex. rel.* Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), the Eighth Circuit concluded:

> [T]he body of legislative documents concerning the Lake Traverse Reservation does not, against the glare of *Seymour* and the more recent judicial guidance in *Mattz*, *Condon*, and *New Town*, demonstrate congressional intention to disestablish the reservation.

Id. at 102. Although in two footnotes the court cited several congressional reports, it apparently did not feel that these reports shed any light as to congressional intent to disestablish the reservation. *Id.* at 102 nn.6-7.

58. 545 F.2d at 127.

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

60. "Indian country" is defined in note 8 *supra*.

61. This case has been criticized because the result was reached without reliance on the legislative materials in determining congressional intent. Comment, *New Town et. al: The Future of an Illusion*, 18 S.D.L. REV. 85 (1973). *But see* Smith, *New Town et al: A Reply*, 18 S.D.L. REV. 327 (1973).

pointed to the similarity between the Act of 1910 and the Act involved in *Seymour*, and that its determination was made in light of the earlier principles espoused by the Supreme Court.[62]

In *Rosebud Sioux Tribe v. Kneip*,[63] decided after *DeCoteau*, the Eighth Circuit attempted to ascertain the congressional intent in enacting the surplus land statutes involved by intensively analyzing all materials pertinent to the legislation.[64] The glare of precedent which seemed so important in cases such as *New Town* was given limited importance.[65] The opinion itself is an extensive documentation of the congressional histories and circumstances surrounding the passage of the Acts involved.[66] After this in depth analysis, the court concluded that the congressional intent in passing the Acts was clearly to diminish the reservation by opening the lands for settlement to non-Indians.[67]

The significance of *DeCoteau* is not that the results in earlier cases such as *New Town* may be contrary to those in recent cases such as *Rosebud*. The significance is the *way* those results have been determined in recent cases. *DeCoteau* has clearly shown that to determine the effect a particular statute had on reservation boundaries, the courts must not rely on general principles of Indian law in ascertaining congressional intent. That determination must be made only after an exhaustive search of the legislative his-

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62. 454 F.2d at 125. Instead of relying on the legislative history and circumstances surrounding the passage of the act of 1910, the New Town court placed primary reliance on the following principles: (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). (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, 413 (1968). (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).

For an analysis of *New Town*, *see* 49 N.D.L. REV. 410 (1973). *See also* note 61 *supra*.

63. 521 F.2d 87 (8th Cir. 1975). This case affirmed the memorandum decision of Bogue, District Judge, in Rosebud Sioux Tribe v. Kneip, 375 F. Supp. 1065 (D.S.D. 1974). The tribe, in a declaratory judgment action, sought a judicial declaration that three surplus land statutes (The Act of May 30, 1910, ch. 260, 36 Stat. 448; The Act of March 2, 1907, ch. 2536, 34 Stat. 1230; The Act of April 23, 1904, ch. 1484, 33 Stat. 254) did not diminish the Rosebud Sioux Indian Reservation in South Dakota, or alter its boundaries, and that the state was without jurisdiction therein. The district court, however, did not agree with the tribe, and ruled that the reservation boundaries were diminished by the surplus land acts involved. *Accord*, United States *ex. rel.* Cook v. Parkinson, 396 F. Supp. 473 (D.S.D. 1975), which dealt with the Pine Ridge Indian Reservation, also located in South Dakota.

64. The materials the court found relevant included debates on the legislation, official correspondence pertaining to the legislation, administrative treatment of the area, and information placing the Acts in their proper historical context, such as the social forces at work in the area, and in particular the great demand for land on the part of white settlers which necessitated opening the reservation to homesteading and settlement). 521 F.2d at 91.

65. In the words of the court:

> In view of the many authorities cited to us, we deem it pertinent to note at the outset that they are of *limited utility* and we comment only on those deemed relevant to decision herein.

Id. at 89 (emphasis added).

66. The court reviewed the pressures for opening the reservation, the legislative histories of the Acts in question, their contents, provisions, contemporaneous construction, and subsequent treatment and interpretation. *Id.* at 113-14.

67. *Id.* at 114.

tory and surrounding circumstances of each act. Since each surplus land statute and the reservation it affected must be individually analyzed under the *DeCoteau* rationale, it appears that litigation will continue until the boundaries of reservations affected by each surplus land statute have been determined. Many earlier decisions in which in-depth analyses of congressional intent were not performed will undoubtedly be relitigated. This is of particular significance to states such as North Dakota,[68] where cases involving surplus land statutes prior to *DeCoteau* were decided with little if any reference to the congressional history and surrounding circumstances of the surplus land statute involved.[69] At least in *DeCoteau*, courts have been provided with the guidance needed to determine the effect a particular surplus land statute had on the boundaries of the reservation involved.

JAMES M. BEKKEN

INDIANS—JURISDICTION—INDIVIDUAL CONSENT TO STATE JURISDICTION BY RESERVATION INDIAN INEFFECTIVE.

In December, 1971, an automobile accident occurred on a North Dakota state highway within the boundaries of the Fort Totten Indian Reservation. The non-Indian plaintiff commenced an action against the defendant, an enrolled member of the Turtle Mountain Band of Chippewa Indians, in state district court. Subsequent to commencement of the action, the defendant signed a document consenting to the

68. North Dakota, on behalf of itself and nine other states, filed a brief Amici Curiae for the respondent state court in *DeCoteau*. Brief for the state of North Dakota *et. al.* as Amici Curiae, DeCoteau v. District County Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975). (The nine states were California, Idaho, Iowa, Montana, Nebraska, Nevada, New Mexico, Wisconsin, and Washington). In its brief, the State of North Dakota noted:

> These States have all experienced the difficult nagging problems of the questionable status of certain geographical areas which were at one time In dian Reservations but later were deemed non-reservation areas and recently designated as Indian reservations again. This creates a monumental problem with law enforcement and also with the status of lands within the area particularly for the non-Indian landowners.

Id. at 1.

The Indian tribe's counterargument centers around their right of sovereignty and a desire to have jurisdiction remain in the tribe. This right of self-government was the paramount concern in Justice Douglas' dissent in DeCoteau v. District County Ct. for Tenth Jud. Dist., 420 U.S. 425, 460-68 (1975).

69. Although the case must be analyzed on its own merits, there are several factors in the recent *Rosebud* decision which *may* be of significance in the determination of whether *New Town* will be relitigated in the near future: (1) *Rosebud* is the first Eighth Circuit case to extensively examine legislative history and circumstances—*New Town*, wherein the result was opposite of that in *Rosebud*, made little use of such information. (2) One of the acts (Act of May 30, 1910, ch. 260, 36 Stat. 448) interpreted in *Rosebud* was passed by Congress only two days before the Act of June 1, 1910, ch. 264, 36 Stat. 455 involved in *New Town*. (3) The provisions of these two acts are very similar though not identical. (4) The state of North Dakota's concern over the present status of surplus lands opened on reservations. *See* note 68 *supra*.