

Public Land and Resources Law Review

Volume 0 Fall 2014 Case Summaries

Smith v. Parker

Lindsay M. Thane

University of Montana School of Law, lindsay.thane@umontana.edu

Follow this and additional works at: <http://scholarship.law.umt.edu/plrlr>

 Part of the [Environmental Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Thane, Lindsay M. (2013) "Smith v. Parker," *Public Land and Resources Law Review*: Vol. 0, Article 12.

Available at: <http://scholarship.law.umt.edu/plrlr/vol0/iss5/12>

This Case Summary is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land and Resources Law Review by an authorized administrator of The Scholarly Forum @ Montana Law.

***Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014)**

Lindsay Thane

ABSTRACT

The Eighth Circuit Court of Appeals found that an 1882 Act of Congress did not intend to diminish the boundaries of the Omaha Indian Reservation in Nebraska. The district court’s decision was affirmed because reservation land may not be divested from the tribe absent clear congressional intent to alter the reservation’s boundaries. Because the Omaha Reservation land was not diminished, the town of Pender, Nebraska—which currently sits on Reservation land—and residents of Pender, Nebraska who are engaged in the sale of alcoholic beverages must comply with the Omaha Tribal Code’s imposition of a ten percent sales tax on these beverages.

I. INTRODUCTION

The appellant-plaintiffs, alcoholic beverage sellers in Pender, Nebraska, brought suit to enjoin the Omaha Tribe (“Tribe”) from enforcing its Beverage Control Ordinance.¹ The Beverage Control Ordinance implemented a ten percent sales tax on alcohol purchased on the Omaha Indian Reservation (“Reservation”).² The central issue in the case was whether an 1882 Act of Congress intended to diminish the Reservation’s boundaries.³ Appellants and the State of Nebraska, as intervenor, (“Plaintiffs”) argued that Pender was not on Reservation land, and thus did not have to comply with the alcohol sales tax.⁴ However, the United States Court of Appeals for the Eighth Circuit affirmed the United States District Court for the District of Nebraska’s opinion that the evidence surrounding the passage of the 1882 Act demonstrated that Pender was situated on the Reservation, thus allowing the Tribe to enforce its alcohol tax.⁵

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2006 the Secretary of the Interior approved an amendment of the Omaha Tribal Code to include a “ten percent sales tax on the purchase of alcohol from any licensee on tribal

¹ *Smith v. Parker*, 774 F.3d 1166, 1167 (8th Cir. 2014) [hereinafter *Smith II*].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1168.

land.”⁶ The Tribe attempted to implement this tax on all alcoholic vendors in Pender, prompting Plaintiffs to file and claim that they were not located on the Reservation, and not subject to the Tribe’s jurisdiction.⁷ The Plaintiffs exhausted their remedies in Omaha Tribal Court, but because the question presented is an issue of federal law, the district court reviewed the case *de novo*.⁸ The district court held that the 1882 Act did not diminish the Omaha Indian Reservation’s boundaries.⁹ Subsequently, the court denied the Plaintiffs request for summary judgment and relief from the Tribe’s enforcement of the Beverage Control Ordinance.¹⁰

The Plaintiffs appealed the district court’s denial of their summary judgment motion to enjoin the Tribe from enforcing the Beverage Control Ordinance by arguing that the Reservation was diminished by the 1882 Act and Pender is not on Reservation land.¹¹

III. ANALYSIS

The Eighth Circuit’s analysis focused on the effect of the language of the 1882 Act on Omaha Reservation land.¹² Of note to the court, was the absence of language referring to “cession” and “sum certain,” which are indicators of the termination of reservation status.¹³ Therefore, the court found no congressional evidence persuasively demonstrating an intent to change the reservation boundaries.¹⁴ Instead, the court reasoned that Congress simply intended to be the Tribe’s “sales agent” to help sell some reservation land.¹⁵ The Eighth Circuit referenced historical facts also cited by the district court to determine that the Reservation boundaries were not diminished, yet the court declined to repeat the analysis.¹⁶

Nonetheless, the district court’s analysis was helpful to fully understand the reasoning behind the decision that the Reservation was not diminished, rather, non-Indians were simply

⁶ *Id.* at 1167.

⁷ *Smith v. Parker*, 996 F. Supp. 2d 815, 817-18 (D. Neb. 2014) [hereinafter *Smith I*].

⁸ *Id.* at 819.

⁹ *Id.* at 844.

¹⁰ *Id.*

¹¹ *Smith II*, 774 F.3d at 1167.

¹² *Id.*

¹³ *Id.* at 1168 (citing *S.D. v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1167-68.

allowed to settle within the Reservation boundaries.¹⁷ For a reservation's boundaries to be altered, Congress must intend to create a smaller reservation or adjust the boundaries.¹⁸ There are three factors to determine Congress's intent to diminish the reservation: "the statutory language, the historical context, and the population that settled the land."¹⁹ The standard of review was that ambiguities should be resolved in favor of the Indians.²⁰

A. Statutory Language

The district court found that the statutory language of the 1882 Act was the most persuasive evidence supporting the conclusion that the Reservation was not diminished.²¹ The 1882 Act stated the Indians could select parcels of land "*in any part of said reservation either east or west of said right of way,*" suggesting that Congress intended the land west of the right-of-way to remain part of the Omaha Reservation.²² This treaty language differed from treaties in 1854 and 1865, which diminished the Reservation.²³ The choice to use different language indicated that Congress did not intend to diminish the reservation in the 1882 Act.²⁴

B. Historical Context around Passage of the 1882 Act

If statutory language does not sufficiently demonstrate Congress's intent, the circumstances surrounding passage of the Act may also be used as evidence that the Reservation's boundaries have changed.²⁵ The district court examined testimony by members of Congress prior to the passage of the 1882 Act and found that Congress did not contemplate whether the area west of the right-of-way was to be sold in parcels and therefore, no longer within the Reservation.²⁶ Additionally, there were no discussions about the effect of the Act on the Reservation's boundaries and on the Omaha Tribe's sovereignty.²⁷ Thus, the legislative history did

¹⁷ *Smith I*, 996 F. Supp. 2d at 834.

¹⁸ *Id.*

¹⁹ *Id.* at 835.

²⁰ *Id.*

²¹ *Id.* at 836.

²² *Id.* (emphasis in original).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 828 (citing *Yankton Sioux Tribe*, 522 U.S. at 351).

²⁶ *Id.* at 823-26, 838.

²⁷ *Id.* at 839.

not establish an “unequivocal” understanding that the Act was intended to diminish the Reservation’s boundaries.²⁸

C. Implementation of Settlement after the 1882 Act

The final element of the analysis examined whether the settlement history and population demographics acknowledge diminishment of the Reservation.²⁹ Few Omaha Indians settled west of the right-of-way, possibly comprising only two percent of the population in that area.³⁰ However, the court recognized “[e]very surplus land Act necessarily . . . degraded the ‘Indian character’ of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.”³¹ Therefore, the court, recognizing the effects of history, found this factor to be unpersuasive and inappropriate to rely upon.³²

IV. CONCLUSION

The district court found that the statutory language in the 1882 Act and its legislative history “fail[ed] to provide substantial and compelling evidence of a congressional intention to diminish Indian lands.”³³ The evidence did not surpass the “presumption in favor of the continued existence” of the Reservation.³⁴ Therefore, the Reservation’s boundaries remained unchanged after the 1882 Act, allowing the Omaha Tribe to implement the 2006 Beverage Control Ordinance against the sellers of alcoholic beverages in Pender.³⁵ It is significant that the Reservation could not be diminished absent explicit action by Congress to change the Reservation boundaries, and even then, any ambiguities about Congress’ intent will be resolved in favor of the Tribe.

²⁸ *Id.*

²⁹ *Id.* at 841.

³⁰ *Id.* at 841, 843.

³¹ *Id.* at 843 (quoting *Yankton Sioux Tribe*, 522 U.S. at 356).

³² *Id.* at 844.

³³ *Id.* at 835 (quoting *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1297 (8th Cir. 1994)).

³⁴ *Smith II*, 774 F.3d at 1168-69 (quoting *Yankton Sioux Tribe*, 522 U.S. at 344).

³⁵ *Id.* at 1169.