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Kloker v. Fort Peck Tribes

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***Kloker v. Fort Peck Tribes*, 2018 WL 7324879 (Fort Peck C.A. Oct. 12, 2018)**

Hallee C. Kansman

Kloker v. Fort Peck Tribes investigates and deciphers the application of the Indian canons of construction to the congressional formation and establishment of the Fort Peck reservation in Montana. In general, courts interpret congressional acts creating reservations through the lens of the tribal-federal government trust relationship. Although this case examines different substantive models of legal interpretation and theories of water law, the ultimate dispute is textual in nature—questioning the plain language of the establishment legislation itself.

I. INTRODUCTION

In 2016, a non-Indian man—Marc Kloker (“Kloker”)—violated a Comprehensive Code of Justice (“CCOJ”) provision when hunting within the exterior boundaries of the Fort Peck Reservation (“Reservation”) without a tribal permit.¹ He allegedly hunted on fee lands owned by a non-Indian.² Kloker’s main argument against his guilt stemmed from the physical changes in the waterway originally used to define the reservation boundary according to the Congressional Act of May 1, 1888 (“Congressional Act”).³ The primary purpose of the Congressional Act was to establish a permanently fixed boundary for the Assiniboine and Sioux tribes (“Tribes”) by identifying a specific territorial jurisdiction.⁴ Upon reviewing both briefs and the lower court’s actions, the Fort Peck Appellate Court (“Appellate Court”) determined oral arguments were not required to decide the issues.⁵ Additionally, the Appellate Court found the Fixed Boundary Theory was the appropriate way to delineate the exterior boundaries of the Reservation; therefore, accretion and avulsion events should not change the designated boundaries.⁶ The Appellate Court remanded the case to the lower court for an evidentiary hearing.⁷

II. FACTUAL AND PROCEDURAL BACKGROUND

1. *Kloker v. Fort Peck Tribes*, 2018 WL 7324879 (Fort Peck C.A. Oct. 12, 2018).

2. *Id.* at ¶ 6.

3. *Id.* at ¶ 1; *see* Congressional Act of May 1, 1888, 25 Stat. 113, 116.

4. *Id.* at ¶ 20.

5. *Id.* at ¶ 2.

6. *Id.* at ¶ 25. Accretion and avulsion are concepts used in water law to determine property boundary lines where changes in a stream’s course occur. Accretion is the process of growth or increase of land area, typically, by the gradual accumulation of additional layers or matter. Avulsion occurs by an abrupt change in a channel in which the stream suddenly leaves its old bed and forms a new one. *See* David H. Getches et al., *Water Law in a Nutshell* 58-60 (5th ed. 2015).

7. *Id.* at ¶ 25.

On May 1, 1888, Congress established the exterior boundaries of the Reservation.⁸ The legislation stated:

the Missouri River acts as the Reservation's southern boundary in the middle of the main channel thereof between the mouths of Big Muddy Creek in the east and the Milk River in the west. The western boundary of the reservation then proceeds north thence up the middle of the main channel of Milk River to Porcupine Creek before bearing to a point forty miles due north in a direct line from the middle of the main channel of the Missouri River opposite the mouth of the Milk River. The boundary then heads due east to form the northern boundary until reaching the middle of Big Muddy Creek, thereby turning south along the middle of that waterway to form the eastern boundary until its nexus with the middle of the Missouri River.⁹

The coordinates 48° 3' 2" N, 106° 17' 22" W marked the point on which a Fort Peck Fish and Wildlife Department Warden ("Warden") found Kloker and another non-Indian hunter—without a Fort Peck Tribal Permit to hunt—on October 4, 2016.¹⁰ This point was just west of the historic Milk River channel, approximately one mile east of the current Milk River channel, a short distance north of the Missouri River, and located on fee lands owned by a non-Indian.¹¹ The Warden determined Kloker's location was well within the Reservation boundary, which he considered to be the current intersection of the Milk River and the Missouri River.¹² The Warden cited Kloker for hunting without a tribal license.¹³

In 2017, Kloker appealed the Fort Peck Tribal Court Order finding him in violation of 19 CCOJ § 201, hunting without a tribal permit within the exterior boundaries of the Fort Peck Reservation.¹⁴ The court exercised its jurisdiction over issues regarding non-Indians on tribal land and found in favor of the Tribe.¹⁵ Kloker received a \$500 fine and the court retained his shotgun as collateral.¹⁶ The Tribes maintained that the language of the Congressional Act was unambiguous and the western boundary was in the middle of the Milk River, wherever it presently lies.¹⁷ In his appeal, Kloker appeared *pro se* in front of the Appellate Court and told the court he

8. *Id.* at ¶ 9.
9. *Id.*
10. *Id.* at ¶ 6.
11. *Id.* (citing 19 CCOJ § 201)
12. *Id.* at ¶ 7.
13. *Id.* (citing 19 CCOJ § 201).
14. *Id.* at ¶ 1.
15. *Id.*
16. *Id.*
17. *Id.*

believed he was hunting outside the Reservation's boundaries.¹⁸ Additionally, Kloker argued the current location of the intersection of the middle of the Missouri and Milk Rivers is not the same point described in the Congressional Act; instead, the point moved one mile west after an avulsion event changed the bed of the river.¹⁹ The Appellate Court accepted Kloker's appeal and issued a stay.²⁰

III. ANALYSIS

A. *Congress Established the Mid-Point of the Milk River as the Western Boundary for the Reservation*

The Appellate Court analyzed the issue by applying the canons of construction.²¹ The United States Supreme Court employs the canons to create "enlarged rules of construction, which ensure that the language used in treaties and statutes with the Indians should never be construed to their prejudice."²² The canons of construction and recognized theories associated with riparian boundaries aid in resolving disputes between sovereigns.²³ In the landmark Indian law case, *Worcester v. Georgia*, Chief Justice Marshall wrote, "[i]f words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."²⁴ The Indian canons are "rooted in the unique trust relationship between the United State and the Indians."²⁵

The Appellate Court pointed to three principles to determine the legal meaning of the language used in federal documents involving Indians: (1) language must be construed as the Indians would have understood it; (2) Indian treaties and statutes must be construed liberally in favor of the Indians; and (3) ambiguities in the language being considered must be resolved in favor of the Indians.²⁶ The Appellate Court referred to Cohen's Handbook of Federal Indian Law, which provides, "the canons have quasi-constitutional status and provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation."²⁷ Thus, according to the Appellate Court's interpretation of the canons of construction, "Congress

18. *Id.* at ¶ 8.

19. *Id.* at ¶ 10.

20. *Id.* at ¶ 1.

21. *Id.*

22. *Id.* at ¶ 13 (quoting *Worcester v. Georgia*, 31 U.S. 515 (1832)).

23. *Id.* at ¶ 12; *see Worcester*, 31 U.S. 515 (1832).

24. *Id.* at ¶ 13 (quoting *Worcester*, 31 U.S. at 582).

25. *Id.* (quoting *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 257 (1985)).

26. *Id.* at ¶ 14 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Tulee v. Washington*, 315 U.S. 681 (1942); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973)).

27. *Id.*; *see FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* §2.02[2], 118-119 (Nell Jessop Newton, ed., 2012).

clearly, unambiguously, and expressly established the mid-point of the Milk River as the western boundary for the Fort Peck Reservation.”²⁸

B. A Shifting Boundary Was Not Necessarily Envisioned in the Congressional Act

The Appellate Court considered two possible theories of boundary determination: (1) the Thalweg Theory; and (2) the Fixed Boundary Theory.²⁹ The Thalweg Theory pertains to shifting boundary lines due to the extremely alterable properties of any riparian boundary.³⁰ When navigable rivers create a boundary between two states, the boundary is the middle of the main channel used for navigation.³¹ The thalweg is the deepest channel of the river, and land formed by accretion belongs to the upland owner.³² Thus, when a river forms a boundary due to changes by gradual erosion from one bank and accretion to the other, that boundary moves with the thalweg.³³

However, an exception to the Thalweg Theory and accretion rule is in the event of avulsion.³⁴ During an avulsive action—a sudden change in the channel—the state boundary line remains fixed with the mid-point of the original channel.³⁵ Even in an avulsive event “such a change of channel works as no change of boundary.”³⁶

The second theory of river boundaries considered by the Appellate Court is known as the Fixed Boundary Theory and details that river boundaries remain fixed according to their historical date due to important historical factors.³⁷ This theory heavily relies on a deeply-rooted historical analysis of enabling acts and chain of title.³⁸ Thus, accretion and avulsion events are not determinative.³⁹ It seems doubtful that Congress or the tribes anticipated a shifting boundary upon ratification of the Congressional Act.⁴⁰ The plain reading of article VIII of the Congressional Act states, “the outboundaries of the separate reservations, or such portions thereof as are *not defined by natural objects* shall be surveyed and marked in a plain and substantial manner.”⁴¹ The Congressional Act’s specific boundary detail fixed a singular point—the northwest corner, at 40 miles

28. *Id.* at ¶ 15.

29. *Id.*

30. *Id.* at ¶ 16 (A thalweg is the middle of the primary navigable channel of a waterway that defines the boundary line between sovereigns).

31. *Id.* (citing *Iowa v. Illinois*, 147 U.S. 1 (1893)).

32. *Id.* (citing *Arkansas v. Tennessee*, 397 U.S. 88 (1970)).

33. *Id.* at ¶ 17.

34. *Id.* at ¶ 18.

35. *Id.*

36. *Id.* (quoting *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892)).

37. *Id.* at ¶ 19.

38. *Id.*

39. *Id.*

40. *Id.* at ¶ 20.

41. *Id.* (quoting Congressional Act of May 1, 1888, 25 Stat. 113, 115) (emphasis added).

due north from the mouth of the Milk River—of which all other boundary corners could be located and determined by natural objects.⁴² Thus, the Appellate Court reasoned the mouth of the Milk River was the single most important aspect in determining not only the precise southwestern corner of the Reservation, but also the entire western boundary.⁴³

The Appellate Court found the Fixed Boundary Theory was most applicable when dealing with the exterior boundaries of the Reservation.⁴⁴ Due to the permanent fixation of the northwest corner, the southwest corner could no longer be defined by a natural object because it too was necessarily fixed in relation to the northwest corner.⁴⁵ The Appellate Court concluded it is likely the Milk River had not flowed exactly in the same manner or in the same location since passage of the Congressional Act and likely will not remain fixed.⁴⁶ Chief Judge Maylinn Smith stated “a court must apply evidence describing the exact location of the middle of the Milk River channel in 1888 using dependable survey records and other such material.”⁴⁷

IV. CONCLUSION

Kloker v. Fort Peck Tribes explores the canons of construction associated with the establishment of the exterior edges of the Reservation and the notions of current water law theories relating to river boundaries. Although natural events, such as those connected with avulsion, commonly occur, they are not seminal to the exterior boundaries of the Reservation. The relationship between the United States and Indian nations, and more specifically between the State of Montana and Indian nations, has continuously remained a point of contention, especially when a tribe appropriately exercises its rights and jurisdictional authority as a sovereign nation. The determination of reservation boundaries using waterways is quite difficult when left without a natural, fixed point; however, in applying the plain text from establishment documents, a tribe can establish the breadth of its reaches.

42. *Id.* at ¶ 21.

43. *Id.*

44. *Id.* at ¶ 25.

45. *Id.* at ¶ 22.

46. *Id.* at ¶ 23.

47. *Id.*