10-1983

Solem v. Bartlett

Lewis F. Powell Jr.

D

PRELIMINARY MEMORANDUM

March 18, 1983 Conference
List 3, Sheet 3

No. 82-1253

SOLEM (warden), et al. v. BARTLETT (Indian convict)

Cert to CA8 (en banc) (Lay, Heaney, Bright, Ross, J. Gibson; McMillian, Arnold, diss.)

Federal/Civil (Habeas) Timely

SUMMARY: The State of South Dakota contends that the CA8 erred in holding that the state lacked criminal jurisdiction over a crime committed by an Indian within a portion of the Cheyenne River Reservation that was opened to settlement by non-Indians in 1908.

FACTS AND HOLDING BELOW: Resp, an enrolled member of the Cheyenne River Sioux Tribe, entered a plea of guilty in state court to a charge of attempted rape. The crime occurred within

Deny - at some point, the state will quit prosecuting these crimes and the U.S. attorney will take up responsibility. There is no reason for the Court to make a ruling on this fact bound case

the original confines of the Cheyenne River Indian Reservation, on unallotted land in a portion of the reservation that was opened to settlement by non-Indians by the federal Act of May 29, 1908. Resp sought post-conviction relief in the state trial court. It is not clear whether resp sought a certificate of probable cause to appeal to the S.D. S.Ct., but the State has conceded that resp exhausted state remedies.

Thereafter, resp filed a petn for habeas relief in federal court (D. S.D., Porter), claiming that crimes committed in "Indian country," as defined in 18 U.S.C. §1151, result in exclusive tribal or federal jurisdiction, and that the state therefore lacked criminal jurisdiction. The state contended that the 1908 Act "diminished" the Reservation, thereby divesting the tribe and federal government of jurisdiction over unallotted lands within the Reservation.

The DC acknowledged that the issue has resulted in conflicting decisions from the federal and the state courts. The CA8 has consistently held that the area in question is "Indian country," see U.S. ex rel. Condon v. Erickson, 478 F.2d 684 (CA8 1973); U.S. v. Dupris, 612 F.2d 319 (CA8 1979), vacated and remanded for consideration of mootness, 446 U.S. 980 (1980) (subsequently dismissed as moot). The South Dakota S.Ct., on the other hand, has consistently held that the Reservation was diminished by the 1908 Act, and is not "Indian country," Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977); South Dakota v. Janis, 317 N.W.2d 133 (S.D. March 10, 1982). Although the CA8 decision in Dupris was vacated by this Court, this Court declined to rule on the merits of the

underlying issue. The DC therefore regarded itself as bound by the CA8 approach, and granted the writ of habeas corpus.

The CA8 affirmed, en banc, "for the reasons set forth in United States v. Dupris, supra; United States v. Long Elk, 565 F.2d 1032 (CA8 1977); and United States ex rel. Condon v. Erickson, [supra]." Two dissenters continued to believe that this Court's decision in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), required the conclusion that the area in question was not "Indian country."

CONTENTIONS: PETR--The decisions of the South Dakota S.Ct. and the CA8 are in direct conflict on this issue, necessitating review. The conflict is of great importance to the general public and law enforcement personnel, since certainty is needed over whether a given area lies within the jurisdiction of the state courts or the jurisdiction of the federal courts. Although this Court has denied petitions in several other diminishment cases, none involved a direct conflict between the federal and state courts. Furthermore, the CA8 decision below conflicted with this Court's decisions in Rosebud Sioux Tribe, supra, and DeCoteau v. District County Court, 420 U S. 425 (1975). The CA8 placed considerable reliance on its decision in Erickson, supra, but that decision preceded this Court's decisions in Rosebud Sioux Tribe and DeCoteau. The South Dakota S.Ct., in contrast, properly analyzed and applied those cases.

AMICUS DEWEY, ZIEBACH, AND CORSON COUNTIES, SOUTH DAKOTA, ET AL.--An amicus brief submitted on behalf of nine counties from five states in the area supports petr. Each of the counties con-

tains lands similar to those at issue here. The counties argue that, despite the principles announced by this Court in Rosebud Sioux Tribe and DeCoteau, no consistent application of those principles has emerged. The CA8 misapplied those decisions, and the judgment below should be reversed.

RESP--Resp acknowledges the existence of a conflict, but argues that resolution of the conflict is not so important as to warrant review. Almost all jurisdictional disputes have arisen from criminal felony prosecutions. Because of federal supremacy and the availability of habeas corpus under 28 U.S.C. §2254, the CA8's construction of the 1908 Act provides a practical governing rule. In recent years, the U.S. Attorney has followed the CA8 rule and asserted federal jurisdiction over major crimes by Indians in the area. In fact, therefore, the CA8 standard provides sufficient certainty over jurisdiction in the area.

Moreover, the CA8 decision is consistent with Rosebud Sioux Tribe, supra, and other decisions of this Court. Although Rosebud held that a grant of other lands to the State of South Dakota for the use of common schools evinced an intent to disestablish those area, there are three significant differences between the two cases. In Rosebud, this Court noted that neither Congress nor the Department of Indian Affairs had sought to exercise its authority over the area in question, and that the area was over 90% non-Indian. In contrast, the Reeservation in this case has an Indian majority and contains the Indian capital and the BIA headquarters for the reservation. Second, the Rosebud Indians had agreed to cede to the United States all their claim, right,

title and interest in part of the reservation. No such agreement exists here. Finally, in Rosebud this Court emphasized a Presidential Proclamation opening the reservation to settlement and stating that the Indian tribe had ceded "forever and absolutely, without any reservation whatsoever, ... all their claim, title, and interest of every kind and character." In contrast, the proclamation in the present case merely opened to settlement "all the nonmineral, unallotted, unreserved lands within the ... Reservation." The CA8 properly recognized that these and other differences require a different result here than in Rosebud.

DISCUSSION: This case merely involves the application of standards set forth in Rosebud Sioux Tribe, supra. Unfortunately, the South Dakota S.Ct. and the CA8 have reached opposite results in applying those standards to this Reservation, and neither court seems inclined to give in. There does not appear to be any clearly correct answer; the legal question essentially turns on which way one chooses to interpret a massive amount of ambiguous historical evidence relevant to congressional intent. As a practical matter, the CA8 standards are likely to dominate (if only because the CA8 will grant writs of habeas corpus from any state criminal convictions), but certainty is needed on whether state or federal jurisdiction applies in this area. I therefore see no way around a grant in this case, although it may be worthwhile to call for the views of the Solicitor General to see whether he suggests any good way of avoiding plenary review.

There are a response and an amicus brief.

March 7, 1983 Foote Ops in petn

because the parties are stubborn. I would wait to see if the parties cannot work out some practical solution.

JRB

Resp acknowledges the disagreement between the Federal and state courts, but contends that review by the Court is unnecessary. Because of Federal supremacy, the Federal court's resolution of ~~Federal Supremacy~~ the issue is binding and will be followed in practice.

The CA's decision is consistent with Rosebud. The Cheyenne River Reservation differs from the Rosebud Reservation in subsequent treatment of the opened area by the Interior Department and Congress, and there are crucial differences between the statute at issue here and those involved in Rosebud.

The SG argues that the only issue tendered by the petn is the continuing status as "Indian country" of a portion of one Indian Reservation in S.D. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in three CA8 cases. One was cited and quoted with approval in Mattz v. Arnett, 412 U.S. 481, 494 n.19, 505 (1973).

One of the CA8 cases was vacated by this Court for mootness, and the S.D. apparently relied on this action in ruling contrary to the CA8. That situation is of course altered, now that the Federal appellate court, sitting en banc, has again re-affirmed the status of the opened area of the Cheyenne River Reservation. If the present decision stands, it may well be that the S.D. court will acquiesce in this declaration of Federal law.

I agree with the SG and recommend denial.

JRB

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 82-1253

Submitted ....., 19... Announced ....., 19...

SOLEM, Warden

vs.

BARTLETT

Stell Deny

Response & views of the SG received - see back.

Views of S.G.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓	~~✓~~		SG	SG							
Brennan, J.			✓										
White, J.		✓											
Marshall, J.					SG	SG							
Blackmun, J.		✓											
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.					SG	SG							
O'Connor, J.					SG								

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 82-1253

Submitted ....., *19*... *Announced* ....., *19*...

SOLEM, Warden

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Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.			✓										
White, J.		✓	✓										
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

Reviewed 12/6

Agree with Cammie that CA8 was right in holding the land at issue - that opened to settlement by non-Indians by Act of 1908 - remains W/in the Cheyenne Reservation.

BENCH MEMORANDUM

No. 82-1253

(Argument Date December 7, 1983)

Cammie R. Robinson — Solem v. Bartlett — December 5, 1983

Question Presented

Whether the Act of May 29, 1908 [1908 Act] terminated the reservation status of those portions of the Cheyenne River Indian Reservation opened to purchase and settlement by non-indians, thereby giving South Dakota criminal jurisdiction over offenses involving Indians occuring on those opened portions.

I. BACKGROUND

There are three types of land relevant here: (1) tribe owned land within the Cheyenne River Indian Reservation [Reservation]; (2) non-indian owned land within the Reservation; and, (3) land beyond the boundaries of the Reservation. The first two types of land constitute "Indian Country" within the meaning of 18 U.S.C. §1151.[1] Generally, only federal and tribal courts have criminal jurisdiction over offenses involving Indian affairs in "Indian Country."[2] The State has conceded that if the act at issue here occurred in "Indian Country" it does not have jurisidiction. The act indisputedly occurred on non-indian owned land that was within the original boundaries of the Reservation but that was opened to settlement by the 1908 Act. The State claims that the 1908 Act terminated the reservation status of all land opened by that Act that was subsequently sold to non-indians. Respondents argue that the 1908 Act merely opened the land to settlement without diminishing the Reservation boundaries. The history necessary to resolve this dispute is set out most clearly in the SG's Brief at 7-21. I will merely summarize the major points.

At the time of the 1908 Act, Congress was taking steps

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[1]The text of §1151 is set out in Appendix C of the Cert. Petition at A-13. It is important only for the fact that it defines both indian owned and non-indian owned land within a reservation as "Indian Country."

[2]The exceptions to this rule are not relevant here.

toward the eventual abolishment of the reservation system and the assimilation of the Indian. This goal was being approached in two different ways. First, the "cession" approach effected a present and total surrender of all tribal interest in the ceded land in return for an unconditional commitment by the United States to an agreed payment. Under this approach, the reservation status of the ceded lands terminated as soon as the agreement was perfected. Second, the "land sale" approach opened up unallotted reservation lands to sale to and settlement by non-indians under the provisions of the homestead and township laws. Under this approach, the Government acted as a sales agent, promising to credit the proceeds of the land in trust to the benefit of the tribe. Although it was anticipated that the unallotted lands would be sold, the Indian assimilated, and the reservation status of all lands terminated, Acts that merely opened land up to settlement did not express the same intent immediately to terminate the reservation status to the opened land as did the cession agreements.

In the 1930's Congress changed its Indian policy and, in the Indian Reorganization Act of 1934, renewed its commitment to preservation of the reservation system. It did so partly by returning to tribal ownership all the unsold lands that had been opened up in the early 1900's. This policy has persisted, and to give it effect, this Court has developed certain legal standards to resolve the question whether any given act of Congress immediately diminished reservation boundaries or merely opened land to non-indian settlement without immediately terminating the

reservation status of such land.[3] See Rosebud Sioux Tribe v. Kniep, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). These legal standards are not disputed here. The only question is whether CA8 applied them correctly when it held that the 1908 Act did not diminish the reservation boundaries established in 1889. I read the applicable legal standards as follows:

> (1) Congressional intent controls. See Rosebud, 430 U.S. at 586; DeCoteau, 420 U.S. at 444.
>
> (2) In determining intent, this Court will read doubtful or ambiguous expressions in favor of the Indian and against termination of reservation status. See Rosebud, 430 U.S. at 586; Mattz, 412 U.S. at 505 ("A congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances.").
>
> (3) "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." Rosebud, 430 U.S. at 505. See also DeCoteau, 420 U.S. at 447 (An Act "could be considered a termination provision only if continued reservation status were inconsistent with ... [the] opening of lands to settlement.").

Remaining true to these legal standards often requires different results depending on the particular Act involved. Compare Rosebud, 430 U.S. 584 (Acts of 1904, 1907, and 1910 showed clear intent of Congress to diminish boundaries of Rosebud

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[3]Sale of unallotted reservation land to non-indians does not automatically terminate its reservation status. Only an act of Congress can do that. See United States v. Celestine, 215 U.S. 278, 285 (1909) ("[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.").

Reservation and to terminate reservation status of opened land); DeCoteau, 420 U.S. 425 (agreement with the Sisseton and Wahpeton Indians showed clear intent to terminate reservation status of all unallotted lands of the Lake Traverse Indian Reservation), with Mattz, 412 U.S. 481 (Act opening unallotted reservation lands to settlement did not show clear intent to terminate reservation status of such lands); Seymour, 368 U.S. 351 (same).

The Court granted cert. in this case to resolve the conflict between CA8 and the South Dakota Supreme Court over the interpretation of the 1908 Act. Since its decision in United States v. Erickson, 478 F.2d 684 (CA8 1973), CA8 consistently has held that the 1908 Act did not diminish the original boundaries of the Cheyenne River Reservation. See United States v. Dupris, 612 F.2d 319 (CA8), vacated as moot, 446 U.S. 980 (1979); United States v. Long Elk, 565 F.2d 1032 (CA8 1977).[4] State courts, on the other hand, consistently have held that the 1908 Act terminated the reservation status of all opened lands sold to non-indians. See South Dakota v. Janis, 317 N.W. 2d 133 (1982); Stankey v. Waddell, 256 N.W. 2d 117 (S.D. 1977).

II. DISCUSSION

The State argues that the 1908 Act at issue here is more

[4]Although Erickson was decided before this Court's decisions in Rosebud and DeCoteau, CA8 re-examined the issue in Dupris and found its prior decision fully consistent with the intervening Supreme Court decisions.

similar to the Acts construed in Rosebud and DeCoteau than to those construed in Mattz and Seymour and that Congress clearly intended immediately to terminate the reservation status of the lands thereby opened to settlement. I disagree.

Applying the relevant legal standards to the acts opening the Rosebud Reservation to settlement, this Court found on the face of the 1904 Act a clear congressional intent immediately to diminish reservation boundaries.[5] The crucial language of that Act provided in relevant part:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situtated within the boundaries of Gregory County. Rosebud, 430 U.S. at 597 (emphasis added).

The Court held that this language was "'precisely suited' to disestablishment," Rosebud, 430 U.S. at 589 n.5, 592, and that it made clear that Congress had enacted all three Acts

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[5]The opening of the Rosebud Reservation was accomplished by three acts. In 1901, Inspector James McLaughlin was sent to negotiate a cession agreement with the Indians occupying the Rosebud Reservation. He explained to them that the agreement would "leave your reservation "a compact, and almost square tract, and would leave your reservation about the size and area of the Pine Ridge Reservation." Rosebud, 430 U.S. at 592. Three fourths of the male Indian adults signed this agreement. Congress failed to ratify it because it provided for an outright payment of $1,040,000 to the Indians. In 1904 an agreement was signed by a majority of the male Indian adults that was identical to the 1901 agreement except for the terms of payment. Additional lands were opened to settlement by the acts of 1907 and 1910 and this Court found that the cession intent remained the same in those acts as it had in 1901 and 1904. See Rosebud, 430 U.S. at 606, 609.

with the "unmistakable baseline purpose of disestablishment," id. at 592. Thus, the Court held that the Acts were intended to diminish reservation boundaries "pro tanto" rather than at some point in the future. See Rosebud, 430 U.S. at 588. The legislative history supports this conclusion. See H.R. Rep. No. 443, 58th Cong., 2d Sess. 1, 3 (1904) quoted in Rosebud, 430 U.S. at 595 n.17.[6]

The language of the 1908 Act is distinguishable and suggests that the Act was merely a "land sale" agreement similar to that described in Mattz. The terms of the 1908 Act proclaim only that the unallotted portions of the reservation will be opened to entry and settlement by, and sale to, non-indians. The operative language provides in relevant part:

> That the Secretary of the Interior ... is ... authorized and directed ... to sell and dispose of all that portion of the Cheyenne River ... reservation[] ... lying [between certain designated boundaries] .... Section 1 of 1908 Act at A-3.

The other terms of the Act merely describe how the land is to be surveyed, divided, and sold (Sec. 2); how the price is to be determined (Sec. 3); the manner in which payment is to be made

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[6]The decision in DeCoteau that reservation boundaries had been diminished was based on identical language, see 420 U.S. at 445, and similar legislative history, id. at 433-35. The language and legislative history made clear that Congress and the Indians were fully aware of and intended immediately to terminate the reservation status of the unallotted lands opened to settlement. The Court, however, was careful to emphasize that its decision was fully consistent with the legal principles discussed above. See 420 U.S. at 447 ("We adhere without qualification to both the holdings and the reasoning of those decisions [in Mattz and Seymour]. But the gross differences between the facts of those cases and the facts here cannot be ignored.").

(Sec. 4); and the manner in which such payment is to be credited to the Indians (Secs. 5 & 6). The Act seems merely to establish a land sale with the Government acting as real estate agent. Although it would be fair to assume that Congress intended that the reservation eventually would be abolished and the Indians fully assimilated, I agree with Respondent and the SG that on its face the 1908 Act does not express the clear intent immediately to diminish reservation boundaries that this Court has required in all of its prior cases.

In both the Rosebud Acts and the 1908 Act, the language of the first section, discussed above, announces the general purpose of the legislation and provides the clearest indication whether Congress intended the particular Act to diminish reservation boundaries or merely to sell land. Without the unequivocal cession language that was so crucial in Rosebud, the similarities between the Acts at issue in that case and the Act at issue here are insignificant. Although some of the similar provisions are mentioned in Rosebud as supporting the intent to diminish boundaries, they support that intent only when read in context. The Rosebud Court made clear that the determinative factor was the unequivocal cession language in the first section and that all subsequent provisions must be read in light of the purpose announced therein. See 430 U.S. at 608-09. Because the State has not established that the first section of the 1908 Act clearly evidenced an intent to diminish reservation boundaries, its reliance on the similarities between the Rosebud Acts and the 1908 Act is misplaced. Respondent has explained convincingly how

each one of the similar provisions is fully consistent with the preservation of original reservation boundaries. See Resp Brief at 22 (Liquor provision); at 27 (School lands provision).

Interpreting congressional intent is particularly tricky in this area. All of the Acts that opened reservation land to settlement at this time were enacted with an eye toward the eventual abolishment of the reservation system. The only crucial distinction between the various Acts is whether they intended to terminate the reservation status of the opened lands immediately or merely to lay the groundwork for future termination. This is a distinction that Congress probably was not clearly aware of at the time. It is important today because of the renewed commitment to preservation of the reservation system and of the Indian's cultural identity. Besides looking at the statutory language, the distinction is best resolved by looking at the historical context of the Act - both at the time of its enactment and subsequently.

The original boundaries of the Reservation established in 1889 encompassed 2.8 million acres. The 1908 Act opened 1.6 million acres of this land to settlement. At that time, 400,000 acres in the opened area had been allotted as Indian lands and an additional 133,000 acres were allotted before the 1909 Proclamation. This left some 1 million acres open to homesteaders. See SG's Brief at 26-27 n.31. Although the SG is unable to give the actual acreage, he informs the Court that "most of the remaining unallotted land was unsold." Today, "almost half the opened area remains in Indian ownership, all of

it, with minor exceptions, in trust or restricted status." Id. Despite the attempts of 1908, the Indian remained the prominent resident of the Cheyenne River Reservation. In light of these statistics, this Court should be slow to infer an intent to diminish reservation boundaries from less than compelling evidence.

Since the 1908 Act, both the Secretary and the Tribe have acted as if the original reservation boundaries have remained in tact. After passage of the Indian Reorganization Act of 1934, the Secretary approved the Cheyenne River Sioux Tribe's Constitution, which provided in relevant part:

> The jurisdiction of the Cheyenne River Reservation Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries, which are described by the Act of March 2, 1889. Resp's Brief at 37.

At the same time the tribe reorganized its court system, and the Secretary approved its Code of Offenses, which provided in relevant part:

> The [Tribe] ... shall have jurisdiction over all offenses when committed by any member of the [Tribe] on the reservation and any person consenting to the jurisdiction as hereinafter provided. ...
> The Cheyenne River Reservation shall be taken to include all territory within the original reservation boundaries. ... Resp's Brief at 47.

The 1930's did not represent any change in the jurisdiction of the Tribe or the perceptions of the Secretary: the tribal court and tribal police had exercised jurisdiction over the original reservation with the Secretary's approval since at least 1911. See Resp's Brief at 46. In light of this consistent history of tribal jurisdiction, there has been no reported case in which an

Indian was prosecuted by the state prior to 1963.[7] There was good reason for the Indian to be wary of State criminal jurisdiction in 1908. At that time, Indians were very much discriminated against and could not serve on the juries that would try them of any state criminal charge. In light of the strong Indian interest in avoiding State criminal jurisidiction in 1908 and the continued assertion of jurisdiction by the tribal court since that time, this Court should not be quick to infer that the 1908 Act terminated the reservation status of the opened lands.

Finally, Eagle Butte is a town within the area opened by the 1908 Act. It is also the capital of the Tribe and the head of the office of the Bureau of Indian Affairs. The Bureau was moved there in 1950 on the ground that it made more sense to have the office "at some point near the center of the reservation." See Resp's Brief at 35-36. Absent an unequivocal intent to the

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[7]The State's reliance on United States v. LaPlant, 200 F. 92 (D.S.D. 1911), is misleading. In that case a non-indian was indicted for homicide of a non-indian victim on alienated lands within the orginal boundaries of the Reservation. The DC dismissed the indictment for lack of federal jurisdiction on the ground that the State acquired jurisdiction whenever the Indian title to the land was extinguished. That case involved non-indians, but in any event it applied the wrong legal standard to determine the existence of federal jurisdiction. Jurisdiction does not depend on title but on whether the land is within the reservation. See United States v. Thomas, 151 U.S. 577 (1894) (sustaining federal jurisdiction over homicide by Indian occurring on land within a reservation to which Indian title had been extinguished). The "title approach" to jurisdiction taken by the LePlant court has been repudiated by the present definition of "Indian Country," which includes all land within an Indian reservation whether or not held under Indian title.

contrary, I agree with the SG that it does not make much sense "to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of [the] tribal members reside (outnumbering non-Indians there), and where almost half the acreage is Indian owned." SG's Brief at 27.

III. CONCLUSION

The legal principles are clear: this Court will not infer a congressional intent to terminate the reservation status of opened lands absent clear evidence in the language of the Act and the relevant legislative history. CA8 applied the relevant principles to the 1908 Act and found that Congress had not intended to diminish reservation boundaries when it opened the surplus land of the Cheyenne River Reservation to sale and settlement. After reviewing the language of the Act, and comparing it with the language of the Acts that opened the Rosebud and Lake Traverse Reservations, and after reviewing the relevant history cited in the briefs, I believe that the CA8's determination was correct and that this Court should affirm. Yes

TO Cammie
TO Nott

MEMORANDUM TO THE CONFERENCE

RE: Herman S. Solem, Warden, and Mark V. Meierhenry, Attorney General of South Dakota v. John Bartlett, No. 82-1253
(Case was argued December 7, 1983)

DATE: December 8, 1983

Since this case is to be discussed at your Conference tomorrow, before the Attorney General of South Dakota can submit a motion for leave to file a supplemental brief, he has requested that I circulate the attached letter (not referred to at oral argument) calling attention to a significant typographical error in his brief at page A-28.

The same error is repeated in the brief of the respondent at page 21.

Respectfully,

al

Alexander L. Stevas

Doesn't change analysis.

CRR

CIRCULATED
ALS
CASE ARGUED
12/7/83

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December 7, 1983

The Honorable Alexander L. Stevas
Clerk of the Supreme Court of the
United States
1 First Street, Northeast
Washington, D.C. 20543

Re: Herman Solem, et al. v. John Bartlett,
No. 82-1253

Dear Mr. Stevas:

The purpose of this letter is to bring to the Court's attention a serious typographical error appearing in the Appendix to the Brief of the Petitioners filed in the above-captioned case. This error appears in the reproduction of an important portion of the legislative history of the statute in question, and has been repeated in the Brief of the Respondent.

The error is as follows: At page A-28 of the Appendix, lines 16 and 17, the phrase "reservations is diminished" should read "reservations as diminished". See H.R. Rep. 1539, 60th Cong., 1st Sess. at 3(1908).

Thank you for your assistance.

Sincerely,

Tom D. Tobin

Tom D. Tobin
Counsel for the Amici
Counties of Dewey, et al.

cc: counsel of record

82-1253 SOLEM v. BARTLETT Argued 12/7/83

Neuharth (Petr) (AG of S.D.)

(CA8 found the ~~[illegible]~~ state has no criminal juris)

The critical language is "sell & dispose".

The Reservation was "diminished" by 1908 Act. Other Acts with "sell & dispose" language have been construed as SD argues.

Relies on assumption of juris by SD state ~~for years~~ courts for ~~you~~ years - until CA8 took a different view in Condon (1973), Long Elk (1977), & ~~Carter~~ DuBois (1979).

Tobin (also for Petr)

Pre-Rosebud precedents ~~are~~ should not be relevant.

(But Rosebud ~~is~~ Reconsidered

Relies on language in 1908 Act: ~~Here~~ "the diminished portion of the Reservation."

Ms. Lochlear (Resp) (She is Indian) (Strong argument)

Over 60% of the ~~area~~ opened area of the Reservation is occupied by Indians.

~~Since~~ The language in the 1908 Act is quite dif. from language in Rosebud Act.

Language of 1908 denies "land sale" & settlement.

1964 is the first prosecution of an Indian in state court where offense occurred ~~in~~ on Reservation.

(Pros lawyer changes S.G.'s argument as resting on ~~exact~~ mis-statements)

Act reserved certain mineral right in the opened area.

Nor did it alter boundaries of Tribe.

Relies on Arnett.

~~Reference~~

Tribal police have exercised jurisdiction of opened area.

Tribe's only interest is in rights of its members who live on opened land.

The D Indian is accused of rape. The alleged victim is also an Indian.

Relies on BIA Report of 1912 ~~Brief~~ pp 5, 36

Aff'm 8-1

No. 82-1253, Solem v. Bartlett Conf. 12/9/83

The Chief Justice Aff'm

Cited Arnett, Rosebud is distinguishable.

Justice Brennan Aff'm

Justice White Aff'm

82-1253 Solem v Bartlett

Q - whether S.D. has criminal juris over offenses involving Indians on portion of Cheyenne Riv. opened to sale & settlement by whites.

Answer depends on intent of Congress when Act of 1908 opened their land to settlement.

Conflict: We took case to resolve conflict between CA8 (this case) & S.D. cases.

Affirm CA8. Applicable principles are settled. See e.g. Rosebud.

Act of 1908. ~~use~~ Language is to be compared with Act of 1904. It authorizes "sale" of land, as contrasted with the "grant & convey to U.S." language in 1904 Act

Justice Marshall Aff/rm

Justice Blackmun Aff/rm
Fascinating case - esp. the history

Justice Powell Aff/rm
See note

Justice Rehnquist Reverse

Justice Stevens Affirm

Justice O'Connor Affirm

Close call - lots of factors

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 6, 1984

Re: 82-1253 - Solem v. Bartlett

Dear Thurgood:

Please join me.

Respectfully,

John P.S.

Justice Marshall

Copies to the Conference

February 8, 1984

82-1253 Solem v. Bartlett

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 8, 1984

Re: No. 82-1253 - Solem v. Bartlett

Dear Thurgood:

Please join me.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 8, 1984

Re: No. 82-1253 Solem v. Bartlett

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 8, 1984

Re: No. 82-1253 Solem v. Bartlett

Dear Thurgood,

Please join me.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 13, 1984

Re: No. 82-1253 - Solem, Warden v. Bartlett, John

Dear Thurgood:

I join.

Regards,

WEB

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 13, 1984

Re: 82-1253 - Solem v. Bartlett

Dear Thurgood,

Please join me.

Sincerely,

Byron

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 13, 1984

No. 82-1253

Solem v. Bartlett

Dear Thurgood,

I agree.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

&82-1253 Solem v. Bartlett (David)%

TM for the Court
1st draft 2/3/84
Joined by JPS 2/6/84
Joined by HAB 2/8/84
Joined by LFP 2/8/84
Joined by WHR 2/8/84
Joined by SDO 2/8/84
Joined by TM 2/10/84
Joined by BRW 2/13/84
Joined by CJ 2/14/84