

OFFICIAL OPINION NO. 87-22, Existence or section lines as public highways within the external boundaries of the Crow Creek Reservation

July 17, 1987

Mr. Richard Beringson, Secretary
Department of Game, Fish and Parks
Anderson Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 87-22

Existence or section lines as public highways within the external boundaries of the Crow Creek Reservation

Dear Mr. Beringson:

One of your predecessors in office requested an official opinion from this Office in regard to the following factual situation:

FACTS:

Conservation Officers of the Department of Game, Fish and Parks are being asked by the public if hunting related activities and restrictions appropriate to section lines and public roadways elsewhere in South Dakota are applicable on the Crow Creek Reservation. Some citizens contend that no section lines or public highways, as they are known in the state, exist on the Crow Creek Reservation. Therefore, the State laws applicable to hunting, fishing and trapping on these areas do not apply on the Crow Creek Reservation.

Other citizens question this premise and assert that the public rights-of-way hunting laws, retrieval of small game and related hunting, fishing and trapping laws and regulations do apply to roadside areas within the Crow Creek Reservation.

Based on the foregoing the following questions have been asked:

QUESTIONS:

1. Are state hunting, fishing and trapping laws pertaining to allowances and restrictions on section lines and public highways applicable on the Crow Creek Reservation?

2. If the answer to question number one (1) is "No," is there any pertinent distinction for section lines or public highways on the Crow Creek Reservation which adjoin privately owned non-Indian land?

IN RE QUESTION NO. 1:

The federal statute dispositive of this question is the Highway Act of 1866, which provides in pertinent part:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. R.S. 2477, (43 *U.S.C. § 932 (1970)); repealed by Pub.L 94-579, § 706(a), 90 Stat. 2744, 2793 (Oct. 21, 1976).

Repeal did not affect any right of way in existence on October 21, 1976. Pub.L. 94-579, §701(a), Stat. 2744, 2786 (Oct. 21, 1976).

The Highway Act of 1866 constituted a grant to the State of South Dakota and allowed for the creation of easements for section line roads over public lands. As a general rule, lands which are subject to Indian title are not considered public lands. However, lands not subject to Indian title prior to 1866 are considered public lands for the purposes of the Highway Act. Bennett County, South Dakota v. United States, 394 F.2d 8 (8th Cir. 1968); Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975). My analysis in this opinion applies only to the Crow Creek Reservation, since other reservations were established on different dates.

A brief history of the occupation of the lands that now comprise the Crow Creek Reservation will aid in this determination. In February of 1863, Congress passed an act calling for the removal of some bands of Indians from Minnesota to some point outside the boundaries of any state. Act of March 3, 1863, 12 Stat. 819. Apparently, under authority of this act, some bands of Santee Sioux and some Winnebagoes were landed in the area which is now the Crow Creek Reservation, in May and June of 1863, respectively. A survey of the area was subsequently completed on July 1, 1863. A short time later, the bands were again removed, the Winnebagoes in 1864 to the Omaha Reservation, and the Santee Sioux in 1866 to their present Nebraska reservation. The Crow Creek area was later occupied by the Yanktonai Band of the Sioux who were reported to be fanning in the area in 1869. See Report of the Commissioner of Indian Affairs for the year 1863, pp. 317-322 (1864) and the description of the history of the Crow Creek Sioux Indian Reservation by Representative Ben

Reifel, 107 Cong. Record 14771-14773 (August 7, 1961); The Sioux Tribe of Indians v. United States, 2 Ind. Ct. Com. 671 (1954).

A treaty with the Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cut Head, Two Kettle, Sans Arcs, Santee and Arapaho Sioux was ratified in 1868. In Article II, the treaty set apart lands, which included the Crow Creek area, "for the absolute and undisturbed use and occupation of the Indians" therein named. These technical words are the most common method used in treaties, congressional acts and executive orders to create an effective reservation for the use of the tribe. Cohen's Handbook of Federal Indian Law, 300-302 (1982 ed.).

It is my opinion that the 1868 treaty with the Sioux was the first recognition of the existence of Indian title in the land which now makes up the Crow Creek Reservation and that the Act which removed the Winnebagoes and Santee Sioux, conferred no Indian title nor established a reservation at Crow Creek. First, the Removal Act contained no technical language creating a formal reservation for the Winnebagoes or Santee Sioux. In fact, these two bands are not even mentioned by name in the Act. Second, the areas which the particular tribes were to inhabit are not designated or described in the Act itself. The Act merely calls for removal to an area outside any state. Finally, the Act does not make the tribes responsible for the areas they were to occupy. On the contrary, the Act, in Section 5, states that the Indians "shall be subject to the criminal laws of the state or territory in which they may reside." Considering the absence of these elements, and the fact that no executive order or treaty existed with these bands to set aside the Crow Creek area, no Indian title or reservation was established by the 1863 Congressional Act. See Bennett County, South Dakota v. United States, 394 F.2d 8 (8th Cir. 1968).

The 1863 Act provided that the President could establish reservations for Indians removed under it. It would appear, however, that no executive order establishing Crow Creek as a reservation was entered at any time prior to 1868. No such order has been found after a thorough search of government documents and sources. In addition, the 1863 Report of the Commissioner of Indian Affairs, *supra*, makes no references to any such orders.

Therefore, the lands currently held by the Crow Creek Tribe were public lands in 1866 and subject to the grant of easement for section line rights-of-way which had vested in the State under the Highway Act of 1866. Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975).

The answer to your Question No. 1 is Yes.

IN RE QUESTION NO. 2:

Since the answer to your first question is Yes, I need not consider your second.

Sincerely,

Roger A. Tellinghuisen

ATTORNEY GENERAL