

Estray—Indian Reservation—Proceed From Sale of—How Collected.

Where property of other persons than Indians is upon the Indian Reservation it is subject to the proper exercise of the functions of the state government, and money derived from the sale of estrays found and sold upon a reservation belongs to the state.

December 14, 1918.

Hon. D. W. Raymond, Secretary,
Live Stock Commission
Helena, Montana

Dear Sir:

I have your letter of December 3rd, 1918, requesting advice as to how you should proceed to recover the money for certain estray stock sold by the Indian Agent on the Ft. Peck Indian Reservation "under the supervision of a State Stock Inspector." From your letter I gather that the Indian Agent on the above Reservation had rounded up a bunch of estray horses, which said estrays were not, so far as could be determined, the property of the Indians; that thereafter the Indian Agent proceeded to advertise and sell animals as estrays, such sale being, however, conducted under the supervision of one of your State Stock Inspectors; that the Indian Agent now refuses to turn over to your Board the Money received from the sale of these estrays claiming, under advice

from the Commissioner of Indian Affairs, Department of the Interior, that the State authorities have no jurisdiction over matters affecting live stock within the limits of Indian Reservations and that therefore your Board is not entitled to this estray money. Upon the correct answer to this contention depends the question as to who should receive this money.

The precise question does not, so far as I can ascertain, appear to have been passed upon by either a federal or state court. The question is, however as to the jurisdiction of a state government over Indians and Indian country, and upon it there are numerous authorities which are in point in determining the matter before us. The general rule is stated thus in the American and English Encyclopaedia of Law, Second Edition, Vol. 16, Page 221:

“It does not follow because the authority of the federal government over the Indians and the Indian country is supreme, that the state and territorial governments have no jurisdiction whatever over them. Upon the admission of a state into the Union or the organization of a territory, in the absence of treaty provisions to the contrary, the lands embraced therein occupied by Indian tribes becomes a part of the state or territory so admitted or organized, and subject to its jurisdiction, except so far as concerns the government and protection of the Indians themselves, and for purposes relating to the treaties and agreements between the United States and the Indians, in which respects the jurisdiction of the United States is exclusive.”

Citing numerous federal cases including 102 U. S. 145, 116 U. S. 28, 169 U. S. 264, and others. An examination of all of these decisions discloses that while each case turned upon certain facts peculiar to it, the broad practice underlying all the decisions is that stated by the Supreme Court of the United State in *Railway Company vs. Fisher*, 116 U. S. 28:

“The authority (in this case the authority of a territory to tax property on a Reservation) may rightfully extend to all matters not interfering with the protection of the Indians.”

It has repeatedly been held that the property of a person not an Indian and situated upon a Reservation is subject to taxation. *Cosier et al vs. McMillan*, 22 Mont. 484; *Commissioners vs. Railroad Company*, 10 Mont. 414; and *Moore vs. Beason*, Wyo., 51 Pac. 875. This question of the authority of a state to tax property owned by one not an Indian and located on a Reservation was also considered by a federal court in the case of *Truscott vs. Harlbut Land and Cattle Company*, 73 Fed. 60. In that case the court held that the Crow Indian Reservation “is included in the boundaries and jurisdiction of the territory and State of Montana”. This case quotes and discusses at length the several provisions of the Organic Act, the Enabling Act and the Constitution of Montana applicable, and the above conclusion is reached after careful

consideration thereof. What was said in this case relative to the Crow Indian Reservation applies equally to the Ft. Peck Reservation, the facts being identical in each case.

I therefore conclude that the rule is well established that in matters concerning the government and protection of the persons and property of Indians upon a Reservation, the jurisdiction of the United States is sole and exclusive, but that persons other than Indians and property belonging to such persons and located on a Reservation are subject to all proper exercise of the functions of state government, such as taxation, the exercise of the police power, the right to serve civil and criminal process, etc.

The State of Montana, by Chapter 34 of the 1915 Session Laws, gave the Board of Stock Commissioners by and through its legally appointed Stock Inspectors, power to take possession of any and all estrays found running at large within the State of Montana, and to dispose of the same as provided in the Act. It is my conclusion that the horses in question, which were taken up and sold by the Indian Agent, were "within the State of Montana". That they were not Indian property is admitted and it is clear that the right of the State of Montana to subject the property of its subjects to a lawful exercise of the police power (for such the estray law is) is absolute and is not affected by the fact that such property happened to be located within the confines of an Indian Reservation. There is no apparent difference in principle between the right of a state to tax the property of persons not Indians situated on a Reservation and the right to seize it by an exercise of the police power. There is also another reason why the right of your Board to claim this money should be sustained. By an Act of Congress approved May 30, 1908, 35 Stat. 558, Congress provided for the survey and allotment of lands embraced within the limits of the Ft. Peck Indian Reservation and for the sale and disposal of all surplus lands after such allotment. By proclamation of the President of the United States of July 25, 1913, 38 Stat. 1953, all unallotted, non-mineral, unreserved lands within this Reservation were declared open to settlement and entry on and after June 30, 1914. The Ft. Peck Indian Reservation therefore ceased to exist as exclusive Indian territory on and after the above date. The un-allotted lands therein became part of the public domain of the United States and the State of Montana and I am of the opinion that there can now be no possible question of the jurisdiction of your stock inspectors to exercise powers within what was formerly but now is no longer the Ft. Peck Indian Reservation.

There may be some question as to whether or not the unallotted lands formerly embraced within the Ft. Peck Reservation should now be considered "public lands" as that term is sometimes used to designate a class of lands subject to the general provisions of the public laws. The present status of these lands might possibly be considered in the nature of a trustee title whereby the government of the United States undertakes to dispose of them as trustee for the Indians. However, it seems to me beyond question that the State now possesses jurisdiction over these lands to the same extent as over any other portion of the public

domain, subject only to such federal regulation as may be necessary to give effect to the agreement between the government of the United States and the Indians.

You have enclosed with your communications to this office a copy of a letter from the Assistant Commissioner of the Office of Indian Affairs, Department of the Interior, at Washington. From this official's letter I take it that the office of Indian Affairs is disposed to co-operate in all reasonable ways with the state officials and it seems to me that upon this matter being taken up with the Office of Indian Affairs and the reasons for your decision explained in full, an adjustment of this difficulty should be obtained without the necessity of a suit. I am therefore, deferring any advice as to your proper civil remedy until I can communicate with the above official.

Respectfully yours,
S. C. FORD,
Attorney General.