

Opinion No. 8.

Indians—Cities and Towns—Incorporated Cities and Towns—Herd Districts—Territory—County Commissioners—County Herd Districts—Land—Government Lands.

Held: Territory lying within incorporated cities should not be included in herd districts. United States reservations may be included within herd districts. In giving the description of outside boundaries of a herd district, only the outside perimeter need be specifically described and the lands lying within the incorporated cities may be excluded by reference to all lands within corporate boundaries within any incorporated city or town. United States land designated as reclamation land, may be included within grazing districts.

January 12, 1945.

Mr. Oscar Hauge
County Attorney
Hill County
Havre, Montana

Dear Mr. Hauge:

You have requested an opinion on the following questions:

1. Section 3384, Revised Codes of Montana, 1935, reads as follows:

"Herd Districts may be created in any county in the State of Montana to contain fifty-four square miles or more, lying not less than three miles in width, outside of incorporated cities . . ."

Does this statute require the exclusion from herd districts of the territory lying within incorporated cities, or does it merely assist in defining the width of the territory?

2. There are certain blocked and scattered tracts of land lying South of Hingham, in Hill County, which are Indian allotment land, the title to which still remains in the United States. May such lands be legally included within the herd district? Will the inclusion within the herd district of such lands invalidate the district as created? There is some discussion of this matter in Vol. 13, Page 177, Report and Official Opinions of the Attorney General.

3. If a county-wide herd district is petitioned for in Hill County and if the territory involved in the incorporated city of Havre may not be included, then how would you suggest that it be excluded? Would you describe by boundaries and territory the area to be excluded within the herd district, adding the phrase "excluding, however, all lands lying within the corporate limits of the City of Havre"?

4. May a herd district contain reclamation land belonging to the United States?

In your first inquiry you raised the question as to the interpretation of the words "outside of incorporated cities," contained in Section 3384, Revised Codes of Montana, 1935. "Outside" is generally understood to mean without a jurisdiction or beyond certain limits and the Supreme Court has so held. (See *Jarvella v. Northern Pacific Railroad Co.*, 101 Mont. 102, 53 Pac. (2d) 446.)

Therefore, it seems—from a reading of Section 3384, *supra*—the legislature intended herd districts to be outside incorporated cities, and incorporated cities should not be included within such districts.

In answer to your second question—pertaining to the Indian allotment land

which remains in the United States—I believe it is pertinent this land is not within a reservation and in reality it is the same as other government land with the exception it is imposed with a trust, which trust would not affect the status of the state control over the same for police power purposes.

Under Section 3384, Revised Codes of Montana, 1935, it is provided government land may be withdrawn from a herd district in the event there is a tract of land containing eighteen sections of government land. In your inquiry, you refer to Volume 13, page 177, Report and Official Opinions of the Attorney General, wherein it is held that the herd districts would have no jurisdiction over Indian lands due to the fact the United States Department of Indian Affairs has for its purpose the protection of Indians who are and remain its wards, and therefore would not come within the control of the state.

I wish to call your attention to the case of *State v. Phelps*, 93 Mont. 277, 19 Pac. (2d) 319, wherein it is held the state has jurisdiction over Indians off the reservation. In view of the holding of our Supreme Court in this case, it seems conclusive, if this allotment land does not lie within a reservation, it should be treated as other government lands, and the State of Montana would have jurisdiction over it for police powers. (See also *Red Hawk v. Joines (Ore.)*, 278 Pac. 573.)

Your third question again brings up the interpretation of the word "outside" and the statute specifically states "giving outside boundaries." The word "outside" is defined by the International Dictionary as follows:

"The external part; the part, end or side which forms a surface or boundary; whence, that which appears or is manifest, also that which is superficial, the mere exterior."

Generally speaking, the exterior means the outer boundary. Thus, it would not be necessary to describe the boundary in and about the city. Such exclusion might be described as you have indicated, that is, "excluding, however, all lands lying within the corporate limits of the city of Havre." The same phrase could be used in connection with all other incorporated cities within the limits.

In answer to your fourth question, I believe the same reasoning would apply in that instance as applied in the case of Indian allotment land and is therefore answered by the conclusions drawn in relation to your second question.

Therefore, it is my opinion territory lying within incorporated cities should not be included in herd districts; and Indian allotment land not included in Indian reservations or United States reservations may be included within herd districts. In giving the description of outside boundaries of a herd district only the outside perimeter need be specifically described and the lands lying within the incorporated cities may be excluded by reference to all lands within corporate boundaries within any incorporated city or town. United States land designated as reclamation land may be included within herd districts.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General