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To: Oneida Business Committee
From: Francis Skenandore, Tribal Attorney
Date: Nov. 18, 1985
Re: Brown-Outagamie-Oneida Jurisdiction Commission, et al v. Purcell Powless, et al Case No.85-C-1052

You will find attached a copy of the Reply Brief mailed to the United States District Court for Eastern District of Wisconsin and attorneys for the jurisdiction Commission on November 15, 1985.

The brief again deals with the Plaintiffs failure to allege a case on controversy and their attempt to extend generic abstract contention into a concrete conflict.

Their failure to state a claim for reservation disestablishment and any basis/reason for divesting the Business Committee of their legislative immunity for what is alleged contentions. We also raise the issue of indespensable parties again.

This is the last brief to be filed with the Court. It will be up to the Court on how matters proceed at this point whether they will rule on the briefs, schedule a hearing or conference, or request more briefing or information.

Please call on any question. Thank you.

cc: Atty. Hill
Atty. Cornelius

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

THE BROWN-OUTAGAMIE-ONEIDA
JURISDICTION COMMISSION, et al.,

Plaintiffs,

vs. Case No. 85 C 1052

PURCELL POWLESS, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

ARGUMENT

I. THE PLAINTIFFS HAVE FAILED TO ALLEGE A CASE OR CONTROVERSY.

A. The Declaratory Relief Sought Here Does Not Answer Any "Ultimate" Legal Question So As To Distinguish This Case from Wycoff.

Defendants have previously shown Supreme Court authority, holding that such matters as have been alleged here do not constitute a case or controversy bringing this matter within the judicial power. The plaintiffs fail to address United States v. West Virginia, 295 U.S. 455 (1935), where the Court refused to find a controversy in conflicting contentions of jurisdiction over a river by state and federal officials, even though a dam was in process of being built. Plaintiffs' silence testifies to the bearing of that decision here.

plaintiffs flounder. They attempt to formulate some generic jurisdictional issue which can be conclusively answered by a determination of reservation status in abstraction from everything else. There is no such issue on a P. L. 280 reservation.

It simply is not the case that "the conflicting jurisdictional claims of the parties may only be resolved by a judicial determination of the status of the reservation." Pl. Br. at 9. According to the plaintiffs, a holding against reservation status would "permit" local governments to assert regulatory jurisdiction over the fee patented lands. Id. In fact no such holding is necessary to "permit" local government regulation. Regardless of whether the fee lands are included in the reservation, there is not a shred of authority to challenge the local governments' regulatory power over non-Indians on such lands.

Further, the plaintiffs contend, a ruling in favor of reservation status would leave the defendants "free" to assert civil regulatory jurisdiction. No such ruling is needed to "free" the tribe to assert regulatory jurisdiction over its members. Tribal power to regulate the conduct of its members is not constrained by reservation borders. Settler v. Lameer, 507 F. 2d 231 (9th Cir. 1974).

On the other hand, such a ruling would not "free" the tribe to regulate non-Indians on fee lands. Tribal power to

regulate non-Indians is narrowly constrained by Supreme Court precedent. Tribes have no criminal jurisdiction over non-Indians, on tribal lands or fee lands, on-reservation or off, on P. L. 280 reservations or non-280. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). To exercise any non-consensual civil jurisdiction over non-Indians on fee lands, tribes bear the burden of demonstrating that non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 565 (1981).

The plaintiffs' attempt to make the issue of reservation status into a talisman for divining the answer to jurisdictional disputes is futile. On a P. L. 280 reservation where there is no automatic exclusivity between state and tribal jurisdiction, reservation status dictates no generic jurisdictional answer. The fact that fee patented lands lie within a reservation does not necessarily prevent the state and local governments from regulating Indians on those lands. See Vilas County v. Chapman, 122 Wis. 2d 211, 361 N.W. 2d 649 (1985) The fact that lands lie off the reservation does not guarantee state and local power to regulate Indians. United States v. Washington, 384 F. Supp. 312, 339 (E.D. Wash. 1974) aff'd 520 F.2d 676 (9th Cir. 1976) aff'd sub nom. Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979); State v. Arthur, 74 Ida. 251,

261 P. 2d 135 (1953) cert. den. 347 U.S. 937 (1954).

B. The Authority Cited By Plaintiffs Does Not Support The Extension of Judicial Power To A Clash of Abstract Contentions.

The plaintiffs argue that Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) supports a finding of case or controversy premised upon the mere clash of official contentions. The facts of that case are to the contrary. New York enacted specific provisions, §§ 41, 43 and 45 of its Civil Rights Law, barring labor organizations from restricting membership on racial grounds. The plaintiff association's constitution expressly limited membership to the Caucasian and native American Indian races. The plaintiff was "faced with the threat of enforcement," since the clause had been reported to the defendant, the official charged with enforcement of § 43. 326 U.S. at 91. In these circumstances, the parties' conflict over whether the New York law could constitutionally govern the mail association constituted a case or controversy.

It is precisely the cited circumstances which are absent from the plaintiffs' complaint. Rather than the specific, concrete circumstances which illuminated and sharpened the abstract issue of the New York statute's validity, the plaintiffs here present nothing but an abstract disagreement itself. It is as if the association in Corsi had gone to court merely on the strength of state

legislators' contentions that they could regulate the association; and the association had merely contended generically that it could maintain some unstated provision in its constitution in contravention of a hypothetical state enactment. To suggest that such a situation was approved in Corsi as within the Article III judicial power is nonsense.

The plaintiffs point out that injury need not be actual in order to invoke a controversy, provided that there is "a realistic danger of sustaining a direct injury," Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979), or that the "injury is certainly impending" as a result of the threatened action, Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923). But the plaintiffs omit the fact situations which give substance to these formulas.

Pennsylvania v. West Virginia, supra, demonstrates what the Court means by an injury that is certainly impending. The injury threatened in that case was the cutoff of West Virginia natural gas to dependent institutions and domestic users in a large area of Pennsylvania and Ohio. The threat of a cutoff did not consist of contentions or generic assertions of power by West Virginia legislators. It consisted of enacted legislation restricting the transmission of natural gas outside the state. On these allegations of a "certainly impending injury" the Supreme Court found that there was a case or controversy, even though the newly enacted legislation had not reached the enforcement stage.

Such decisions show that a finding of case or controversy requires a rational analysis of the specific, concrete allegations of conflict. Abstract, generic allegations of controversy or injury, such as presented here, do not even allow such an analysis to begin.

Rosebud Sioux Tribe v. Kneip, 375 F. Supp. 1065 (S.D. 1974), aff'd 521 F. 2d 87 (8th Cir. 1975), aff'd 430 U.S. 584 (1977), offered by the plaintiffs as precedent, fails to support the sufficiency of the instant allegations.

First, the Rosebud tribal plaintiff alleged the actual exercise of state jurisdiction:

> Acting on this assertion [reservation borders diminished] the defendants have been exercising both civil and criminal jurisdiction over members of the Rosebud Sioux Tribes . . .

375 F. Supp. at 1066.

Second, South Dakota is a non-280 state, where state and federal-tribal jurisdictions are mutually exclusive. The state's exercise of jurisdiction directly conflicted with the tribe's claim to exclusive jurisdiction over the entire range of criminal and civil matters. Thus, it was not deemed necessary to recite the contents of the criminal and civil codes, and the daily examples of their exercise. The controversy stemmed from the fact that any exercise of state jurisdiction was inimical to tribal jurisdiction, and vice versa. Had South Dakota secured P. L. 280 jurisdiction, the general allegation described would not have sufficed to establish a controversy. South Dakota would

have been entitled to exercise its general civil and criminal jurisdiction over Indians regardless of whether the lands were on or off the reservation.

In our initial brief we contrasted the situation on a non-280 reservation with the situation on a P.L. 280 reservation like the Oneida. On the latter reservation there is no automatic exclusivity between state and local governments on the one hand, the tribe on the other. The mere fact that two governments claim jurisdiction does not, of itself, give rise to a controversy.

We thought that our earlier discussion of P. L. 280 was clear. Our point was that to allege a jurisdictional controversy on a P. L. 280 reservation the plaintiff cannot rely on the automatic assumptions of exclusivity pertinent to non-280 reservations. The plaintiffs convert this into the contention that no jurisdictional controversy can arise on a P. L. 280 reservation. Having constructed this straw man, the plaintiffs pummell it into the ground with citations. Of course, we did not deny the possibility of a jurisdictional controversy arising on a P. L. 280 reservation. In fact, we presented State v. Baker, 464 F. Supp. 1377 (W.D. Wis. 1978) as an example to the court.

Though the plaintiffs beat a dead horse with their citations, their cases underscore the fact that declaratory judgment actions concerning jurisdiction over Indians on P. L. 280 reservations uniformly involve specific, concrete

controversies, engendered by specific governmental enactments and specific actions, or threatened action in violation of those enactments. See e.g., Barona Group of Capitan Grande Band v. Duffy, 694 F. 2d 1185, 1186-7 (9th Cir. 1982) (Tribal Council enacted ordinance authorizing bingo and entered into management agreement to commence operation; undersheriff informed tribal representatives that county bingo ordinance prohibited tribal operation and would be enforced to the extent of entering Indian lands to cite and arrest participants); Santa Rosa Band v. Kings County, 532 F. 2d 655, 311 (9th Cir. 1975) (Indigent tribal members, as result of being unable to pay local building code fees, were deprived of Indian Health Service benefits).

The same type of concrete, fact-specific controversy is found in cases where a tribe asserts jurisdiction over non-Indians on fee land. See e.g., Knight v. Shoshone-Arapaho Indian Tribes, 670 F. 2d 900 (10th Cir. 1982); Confederated Salish & Kootenai Tribes v. Namen, 665 F. 2d 951 (9th Cir. 1982) cert. den. sub. nom. Polson v. Confederated Salish & Kootenai Tribes, 459 U.S. 977 (1982).

II. THE COMPLAINT FAILS TO STATE A CLAIM.

A. In The Absence Of A Surplus Land Act, Or More Express Congressional Authority, The Plaintiffs Allegations Fail To State A Claim Of Reservation Disestablishment.

The plaintiffs defend their allegations with four main contentions. First, they contend that a surplus land act is not prerequisite to the disestablishment of a reservation.

Second, they claim that the 1948 definition of Indian country in 18 U.S.C. 1151 is not relevant to the disestablishment issue. Third, they contend that, pursuant to the General Allotment Act, the fee-patenting of all lands on the reservation would accomplish a disestablishment. And fourth, they contend that mere historical evidence of demographic change and acculturation can establish the reduction or termination of a reservation.

1. Congressional Acts Other Than Surplus Land Acts.

That Congress can declare the termination or disestablishment of a reservation other than through a surplus land act is absolutely true. It is irrelevant here. Our concern is not with what Congress could have done, but with what it is alleged to have done.

Of course Congress has expressed its intent to disestablish in far clearer and unambiguous ways than through a surplus land act. To cite such examples, Pl. Br. at 18, does not avail the plaintiffs here. Since the plaintiffs do not allege the existence of any clear and unambiguous congressional act terminating the Oneida reservation, it is not helpful merely to assert the possibility of such acts.

We emphasized the absence of a surplus land act because that label, as used by the Supreme Court in Solem v. Bartlett, ___ U.S. ___, 104 S. Ct. 1161 (1984), refers to the bare minimum which the courts have accepted as

signalling a congressional termination. Our point was not that such statutes were the only vehicle available for Congress to show its intent; our point was that Congress did not avail itself of any colorable disestablishment vehicle, even the most ambiguous and imperfect, with regard to the Oneida reservation.

2. The 1948 Definition of Indian Country Defines The Modern Issue Of Reservation Disestablishment.

The plaintiffs contend that the 1948 Congressional definition of a reservation for jurisdiction purposes, 18 U.S.C. 1151(a), is irrelevant and begs the question of whether reservation lands have been disestablished. The contention runs up against the Supreme Court's own declarations. As the Court in Solem v. Bartlett, supra, explained at length, the modern issue of disestablishment takes its origin from the 1948 mandate that lands shall not be deemed severed from a reservation merely because they have been fee-patented. See discussion and quotes from Solem in defendant's initial brief at 11-13.

The defendants do not contend that § 1151(a) mandates that all fee patented land (everywhere?) be deemed part of a reservation. We do contend that the 1948 definition bars the severance of once-reservation lands merely because they have been fee-patented. And as an obvious corollary, the definition prevents statutes which merely provide for the allotment and fee-patenting of Indian lands from being

construed as intending the disestablishment of a reservation.

The 1948 Congress was surely aware of the General Allotment Act and its Burke Act amendments, providing for the allotment and fee-patenting of reservation lands on a national basis. It would be unreasonable for Congress on the one hand to declare that fee-patented lands should not be deemed severed, and on the other allow the same result through implying an intent to disestablish in the very legislation which authorized the fee-patenting.

It is precisely because of these consequences of the 1948 definition imposed by Congress that the modern issue of disestablishment arises from surplus land statutes. These statutes go beyond the mere allotment and fee-patenting of land; and therefore their effect on reservation borders is not foreclosed by the 1948 enactment. The 1948 act does not determine the interpretation to be given a specific surplus land act. The 1948 act does show that the plaintiffs' reference to legislation authorizing allotment and fee-patenting of Oneida lands is insufficient for a claim of disestablishment.

3. Disestablishment Through Fee-Patenting Of All Reservation Lands.

Even though the General Allotment Act did not directly disestablish reservation boundaries, the plaintiffs contend, a disestablishment would be automatically accomplished when all reservation lands were fee-patented. In support of this

the plaintiffs offer a truncated quote from Mattz v. Arnett, 412 U.S. 481, 496 (1973). See Pl. Br. at 18. The full text, repeated and emphasized by the Court in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478 (1976) is as follows:

> [The General Allotment Act's] policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished.
>
> 'The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian reorganization Act . . .

(Emphasis added).

A theory of automatic reservation abolition finds no support in the Court's text read in full. The Court did not suggest that upon fee-patenting of all lands the reservation would be abolished; it merely stated that it could be. In other words, Congress, having divested itself of its trust management responsibilities, would feel free to take the next step, i.e., expressly terminating the reservation.

Even if, arguendo, there were support for a theory of automatic abolition, the compelling fact here is that the plaintiffs' allegations fail to meet their own avowed standard for abolition: fee-patenting of all reservation lands. They allege that "virtually all" the lands were fee-patented. By their own standard this won't do. Whatever it does mean, "virtually all" does not mean "all". To take "virtually all" as the standard is tantamount to saying that

Congress abdicated its role in determining when a reservation is to be disestablished and turned it over to the courts. That brings us to the plaintiffs' fourth contention.

4. Judicial Termination Based Upon Historic Demographic Facts.

Finally, the plaintiffs contend that Solem authorizes the courts to find disestablishment of a reservation without any clear congressional authorization, premised merely on historic facts showing demographic changes and the acculturation of Indians.

The contention seriously distorts Solem. The very passage quoted by the plaintiffs makes clear that demographic evidence may be considered in the effort "to decid[e] whether a surplus land act diminished a reservation." Solem v. Bartlett, supra, 104 S.Ct. at 1167, quoted in Pl. Br. at 20. "[W]e look to the subsequent demographic history of open lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." Id. (Emphases added).

Use of such evidence, other than to construe an ambiguous statute, would require the court to assume responsibility for determining what set of facts justify the termination of a reservation. That is the province of Congress. No court in modern times, let alone the Supreme Court, has assumed to itself the power which the plaintiffs

invite this court to assume.

The purpose of the 1948 congressional definition was to produce some order and certainty into reservation jurisdiction by "uncoupl[ing] reservation status from Indian ownership." Solem v. Bartlett, supra, 104 S.Ct. at 1165. The definition has not worked perfectly; uncertainties over the status of surplus or "open" lands survive. But at least the definition set to rest uncertainty over fee-patented allotted lands on reservations without surplus or "open" lands.

The theory the plaintiff advances here would undo the effort at jurisdictional certainty, and place the issue of jurisdiction on every reservation which has ever been allotted up for grabs. Prior to 1948 jurisdiction was dependent on current ownership and the records of the deed office. If the plaintiffs were correct, henceforth jurisdiction would turn on arcane historic data on whether at some time "virtually all" land was fee-patented or whether reservation demography convinces a judge that a reservation should be deemed terminated. It is ironic that, in their quest to resolve their alleged uncertainties, the plaintiffs advance a proposition calculated to create uncertainty on every allotted reservation in the country.

Congress did not intend such a result in its 1948 enactment; and neither the language of the 1948 act, nor the abundant Supreme Court authority on disestablishment, permit

such a result.

B. By Their Silence The Plaintiffs Concede That There Is No Basis For Injunctive Relief Alleged In Their Complaint.

In their initial brief the defendants pointed out the absence of any allegation of irreparable injury such as to warrant the claim for injunctive relief. The plaintiffs attempt no defense of their claim to an injunction, and apparently concede that it merits dismissal.

III. THE PLAINTIFFS ALLEGE NOTHING ON THE PART OF DEFENDANT COUNCIL MEMBERS WHICH WOULD PLACE THEIR CONTENTIONS AND ASSERTIONS OUTSIDE THE RANGE OF LEGISLATIVE IMMUNITY.

At the time of defendants' initial brief we were unaware of the decision in Runs After v. United States, 766 F. 2d 347 (8th Cir. 1985), cited by plaintiffs. Runs After establishes that the absolute legislative immunity recognized under Tenney v. Brandhove, 341 U.S. 367 (1951) applies to tribal council members. 766 F. 2d at 354-5.

There is no basis alleged here for divesting the defendants of their legislative immunity. In their complaint the plaintiffs nowhere ascribe executive or administrative powers to the defendants. The defendants' official capacities are solely alleged to be that of officers and members of the General Council and Business Committee. They are sued for alleged "contentions" and "assertions"; no act or threat of enforcement is ascribed to them.

IV. THE BALANCE OF EQUITIES FAVORS DISMISSAL FOR

FAILURE TO JOIN INDISPENSABLE PARTIES.

As to plaintiffs' attempt to marshall the equities in favor of proceeding without necessary parties:

First, it is nonsense to deny that defendants would be prejudiced by exposure to subsequent relitigation by the state. The state has regulatory interests as great or greater than the local governments. If there are such burning (but unspecified) jurisdictional uncertainties as the plaintiffs contend, they must surely impel the state toward litigation eventually. It is only reasonable to impute the plaintiffs' passion for absolute jurisdictional clarity to state regulators as well, and to prudently expect state litigation in future.

Second, the contention that vindication of plaintiffs' authority through state court enforcement actions would not avail, and that plaintiffs have no avenue for judicial relief other than this action, is equally nonsense. Plaintiffs say they would have to wait for a violation by one of these eight defendants in order to vindicate their authority, as though a violation by any other tribal member would not do as well.

That enforcement actions against individual Oneida who violate local regulations would entail the same sovereign immunity problem as in the instant suit is further nonsense. "The doctrine of sovereignty which was applied in United States v. United States Fidelity & Guaranty Co,

[Citation omitted] does not immunize the individual members of the tribe. Puyallup Tribe v Washington Game Dept., 433 U.S. 165, 171-2 (1977).

V. CONCLUSION

For the reasons stated herein and in their initial brief the defendants request the court to grant their motion and order that the complaint for injunction and declaratory relief be dismissed.

Dated this 15th day of November, 1985.

Respectfully submitted,

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