The Allotment of the Oneida Reservation and its Legal Ramifications

The Oneida Reservation, located in present day Brown and Outagamie Counties, Wisconsin, was set aside by federal treaty in 1838. See Treaty of February 3, 1838, 7 Stat. 566. Article II of the treaty specified that a tract containing 100 acres for each individual Oneida was reserved for the tribe to be held as other Indian lands are held. The Oneida population in Wisconsin at the time numbered 654, resulting in a reservation of approximately 65,400 acres in size. As were other Indian lands, the Oneida Reservation was subject to federal statutory restraints on alienation; those statutes not only precluded outright sale of Indian land but also made Indian lands immune from state law and proceedings that might result in alienation such as taxation, lien and foreclosure. See, e.g., Indian Trade and Intercourse Act, 1 Stat. 137; see generally Cohen's Handbook of Federal Indian Law 108, et seq (1982 ed.). This special legal status of Oneida and other reservations effectively protected the tribes from any serious erosion of their land base.

The allotment policy

In the middle of the nineteenth century, the philosophical underpinnings of federal protections for Indian land began to give way. Through a combination of forces - primarily non-Indian greed for tribal lands and a quest for the ultimate

solution to the 'Indian problem' - federal policy shifted to an assimilationist one. See generally, Cohen's Handbook of Federal Indian Law 128, et seq.

The statutory centerpiece of the assimilation policy was the Dawes Act or the General Allotment Act of 1887. Act of February 8, 1887, 24 Stat. 388. The general purpose of the Act was to put in place a mechanism designed to move Indians away from their communal, tribal economy and culture toward an agrarian, individualistic one. See D. Otis, The Dawes Act and Allotment of Indian Lands (1973). The act provided for the division or allotment of tribal lands in designated amounts among tribal members, such allotments to be held under a trust patent and subject to a restraint against alienation for 25 years. The President was authorized to negotiate for the purchase of any tribal lands remaining after allotments were made. The statute also provided that individual allottees would be subject to certain state civil and criminal law and at the end of the 25 year trust period, their allotments would be fully subject to state law. Clearly, Congress contemplated but did not legislate the demise of Indian tribes at the end of the 25 year trust period. Congress legislated a massive real estate transaction involving Indian lands in the hope that the demise of Indian tribes would follow.

In the twenty years following the Dawes Act, Congress modified and refined the act on a number of occasions.

Congress amended the act by dealing with a number of specific administrative details, such as rights of non-Indians married to tribal members (see 25 Stat. 392, Act of Aug. 9, 1888), and standardizing the size of allotments (see 26 Stat. 794, Act of Feb. 28, 1891). Congress also amended the act by loosening the restrictions on the sale of allotments. See, e.g. Act of May 27, 1902, 32 Stat. 245, authorizing adult heirs of an allottee to petition for sale of an allotment; Act of March 1, 1907, 34 Stat. 1015, 1018, permitting the sale of restricted lands of non-competent allottees. The most important of these amendments was the 1906 Burke Act. 34 Stat. 182. It authorized the elimination of all trust restrictions on an allotment if the Secretary of the Interior deemed the allottee competent. With these modifications and refinements, the General Allotment Act was a detailed program that governed the issuance, sale, use, and inheritance of Indian allotments. See generally, Cohen's Handbook of Federal Indian Law 130-36.

The Dawes Act and its amendments were mandatory and of general applicability, thus requiring the allotment of every Indian reservation, with a few specified exceptions. The administrative work under the statute proceeded quickly. By 1900, the government had approved 53,168 allotments covering nearly 5 million acres. At the same time, the government pressed for the sale of surplus lands left on allotted reservations. But those negotiations proceeded slowly, so that

by 1890, Congress had begun to enact special surplus land acts authorizing the purchase of surplus lands on specific reservations. The surplus lands acts varied in language and legal effect, but the acts all placed tribal lands immediately in the hands of non-Indians. Similarly, many allotments ended in the hands of non-Indians after termination of the trust period or a secretarial determination of competency. Thus, these two devices - allotment and the surplus land acts - had the intended effect of decimating tribal lands. By 1934, total Indian land holdings had been reduced from 138,000,000 in 1887 to 48,000,000. Cohen, Handbook of Federal Indian Law 216 (1958 ed.). In that year, the assimilation policy was repudiated in the Indian Reorganization Act. 48 Stat. 984, Act of February 19, 1934.

The Oneida Reservation fared little better than did most other reservations under the allotment policy. In May 1889, the President directed the allotment of the Oneida Reservation and in July of that year a special agent was appointed for that purpose. Annual Report of the Commissioner of Indian Affairs (1889). Two years later, the special agent submitted for approval by the Secretary of the Interior a final schedule of 1530 allotments at Oneida. Annual Report of the Commissioner of Indian Affairs (1891). No surplus lands remained at Oneida after allotments. Thus, the Oneidas were spared the sudden influx of non-Indians that followed the surplus lands acts

enacted for some reservations. However, non-Indians eventually acquired Oneida land as trust periods expired, incompetent allottees died, and competent allottees failed to pay property taxes. This process accelerated with the enactment of the Burke amendment to the Dawes Act. By the mid-1920's, only a few hundred acres of the Oneida Reservation remained in Indian hands. 15 Handbook of North American Indians at 487, J. Campisi, (Smithsonian Institution 1972). In this respect, the Oneida Reservation was typical of that period.

The pernicious effects of the Dawes Act and the surplus lands acts were not limited to Indian land ownership. Tribal culture is dependent upon a commonly used land base. Thus, the erosion of the land base had the expected debilitating effect on tribal government. However, Indians did not become like non-Indians with the issuance of allotments; they simply became poor Indians. In 1934, Commissioner of Indian Affairs Collier described the failure of the program as follows:

> The operation gets nowhere at all; under the existing system of law it cannot get anywhere; it creates between the Indians and the Government a relationship barren, embittered, full of contempt and despair; it keeps the Indians' own minds focused upon petty and dwindling equities which inexorably vanish to nothing at all.
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> For the Indians the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.

> It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition into the final status of a nonward dependent upon the States and counties.

Memorandum of Commissioner Collier, Hearings, Committee on Indian Affairs, 73d Cong., 2d Sess. on H.R. 7902, pp. 15-18.

Even though the allotment policy has been repudiated, it left a permanent legacy. The presence of non-Indians in large numbers on reservations and the checker-boarded land ownership pattern on reservations have brought tribal governments into direct conflicts with non-Indian governments. The central question in those conflicts is whether the tribal and federal governments retain jurisdiction over the particular reservation, or whether the reservation has been diminished or disestablished thereby allowing for state and local control over the area. Clear legal principles have slowly evolved to answer this inquiry, and as applied to the Oneida Reservation in Wisconsin, those principles leave no doubt that the Oneida reservation remains intact.

The legal standard

The Supreme Court most recently reviewed the determinative principles on the reservation boundary issue in Solem v. Bartlett, 465 U.S. 463 (1984). There, the question was whether a 1906 surplus land act had reduced the boundaries of the Cheyenne River Reservation in South Dakota. The Court

cautioned that the issue is not determined by the general assimilation policy of the allotment act and surplus lands acts:

> Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land acts diminished reservations (citations omitted) and other surplus land Acts did not (citations omitted). The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.

Id., at 468-69; see also Mattz v. Arnette, 412 U.S. 481, 496-97 (1973).

The Court identified three principles by which to measure Congress' intent as to a particular reservation. First and foremost among the principles is that only Congress has the power to diminish a reservation. Solem, at 470. Citing an earlier Supreme Court decision, the Solem Court observed that "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." Id., at 470, quoting United States v. Celestine, 215 U.S. 278. In other words, allotment of a reservation and changes attendant to allotment do not by themselves alter reservation status. In fact, the Celestine Court specifically rejected the argument

that allotment and the granting of citizenship to allottees legislated in the Dawes Act affected reservation boundaries:

> "[I]t is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (The Kansas Indians, 5 Wall 737, 182 L.Ed. 667) and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain. The act of 1887, which confers citizenship, clearly, does not emancipate the Indians from all control, or abolish the reservations."

United States v. Celestine, 215 U.S. at 287. Thus, Congress itself must act to diminish a reservation, but Congress' allotment policy alone did not do so.

The second guiding principle according to the Solem Court is that diminishment of a reservation will not be lightly inferred by a federal court. Since the allotment act did not abolish any reservations, the focus in each case is on the language and intent of a special surplus land act. A surplus land act must contain explicit language of cession or other language evidencing the present and total surrender of all tribal interests to support a diminishment finding. Solem v. Bartlett, 465 U.S. at 470. Those surplus land acts whereby the

tribe agreed to "cede, surrender, grant and convey to the United States all their claim, right, title, and interest . . ." suggest diminishment. Id.; Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1973). Where such a statute also provided for unconditional compensation to the tribe with no continuing trust obligations, a presumption of diminishment arises. Solem, at 470. By contrast, those surplus lands acts that ratified a simple real estate transaction between the tribe and the United States had no effect on reservation boundaries. Id., at 473. Thus, the statutory language is the best evidence of congressional intent to alter reservation boundaries.

Third and finally, other factors can be examined by a court to ascertain Congress' intent. Solem, at 471. For example, circumstances surrounding a surplus land act can demonstrate an intent to diminish a reservation, even in the absence of explicit cession language. See Rosebud, above; United States v. Parkinson, 525 F.2d 705, cert. denied 430 U.S. 982. Subsequent treatment of the area, particularly Congress' own treatment, may also support an inference about Congress' understanding of a particular surplus land act. Solem, at 471. Subsequent demographic history is an additional factor in ascertaining Congress' intent with respect to a reservation. Id., at 472. But, the Court cautioned that these extraneous factors can serve only a limited purpose in construing a

surplus lands act:

> There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Id. In other words, these extraneous factors in and of themselves do not indicate disestablishment of a reservation. Rather, they are relevant only as aids in construing a surplus lands act.

The Wisconsin Oneida Reservation

Those who argue that a reservation has been diminished or disestablished must carry a substantial burden of proof. The proponents must identify an act of congress that on its face or by strong implication and practical effect alters the reservation boundaries. There is no such statute affecting the boundaries of the Oneida Reservation in Wisconsin.

The Oneida Reservation was entirely allotted. No surplus lands remained after allotment and no surplus land act affecting Oneida was ever enacted. Of course, non-Indians did eventually move onto the Oneida Reservation and still reside there today. But those non-Indians acquired Oneida land after the Oneida allottees received fee patents and lost their land through tax foreclosure or similar processes, in other words,

through operation of the allotment policy. That simple change in land title is insufficient to alter reservation status. See Celestine, above.

It bears emphasizing that in no case has operation of the allotment policy alone been held to diminish a reservation. In every instance where a reservation was held diminished or disestablished, the court relied on a surplus land act to reach that result. See Rosebud; DeCoteau; Russ v. Witkins, 624 F.2d 941 (9th Cir. 1980); United States v. Parkinson, above; Ellis v. Page, 351 F.2d 250 (10th Cir. 1965). The reservation boundary issue at Oneida, then, can be resolved by reference to the first guiding principle identified by the Solem Court: there is no act of Congress altering the Oneida Reservation boundaries. Nothing more than the simple transfer of land authorized by the General Allotment Act took place at Oneida. Therefore, all parcels of land within the original boundaries of the Oneida Reservation, even fee-owned land, remain a part of the reservation. Celestine, above; Seymour v. Superintendent, 368 U.S. 351 (1962).

There is some suggestion in the case law that diminishment of a reservation can occur de facto as well as by operation of law. For instance, in Solem v. Bartlett, the Court observed:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian

> settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not dejure, diminishment may have occurred.

Id., at 471. In all likelihood, the Court did not mean to suggest by this that diminishment can take place without an act of Congress directing or causing it. In fact, the Solem Court went on to note that the demographic history of an area is simply "one additional clue as to what Congress expected would happen once land or a particular reservation was opened to non-Indian settlers." Id., at 472. Nor does any other federal case suggest that de facto diminishment can take place in the absence of a "baseline" intent to diminish found in an act of Congress. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 592.

However, even were de facto diminishment possible in the absence of an act of Congress, it cannot be established with respect to the Oneida Reservation. The correctness of this conclusion can be shown by a comparison of the reservations considered in Rosebud (where diminishment was found) and Solem (where diminishment was not found). The Rosebud Sioux Reservation was the subject of three surplus land acts passed in quick succession. Each act was followed by a flood of non-Indian settlers so that the particular area opened up almost immediately lost its Indian character. Rosebud, id., at 605. The changes following the opening of the Cheyenne River Reservation and reviewed by the Court in Solem were not nearly

so dramatic. Few homesteaders moved onto the opened Cheyenne River lands, probably because the land was less fertile than that in southern South Dakota. Change did take place on that reservation but at a much slower pace so that the area never lost its Indian character. Solem, 465 U.S. at 480. In this regard, the Cheyenne River Reservation is much like the Oneida Reservation. If anything, change came slower at Oneida than at Cheyenne River because the Oneida Reservation was never the subject of a surplus lands act. Except for lands reserved for Indian agency uses, the entire Oneida Reservation was allotted to tribal members. Because of the trust restrictions on allotments, no great influx of homesteaders followed on the heels of the allotment of the Oneida Reservation. As happened on other reservations, Oneida allotments eventually changed hands, particularly after the passage of the Burke amendment to the allotment act in 1906. But those land transactions did not alter the Indian character of the Oneida Reservation. Today, nearly five thousand Oneidas live on or near the Oneida Reservation. Indians comprise about 25% of the reservation population, if the nearly exclusively white urban areas at the edge of the reservation are excluded.

The subsequent jurisdictional history of the Oneida Reservation is also like that of the Cheyenne River Reservation. In neither case is there a long history of uncontested state court jurisdiction over the reservation. In both cases, there

is an isolated lower court decision holding that the reservation had been abolished. As to the Oneida Reservation, a lower federal court held in 1909 that the reservation lapsed with the granting of citizenship to Oneida allottees. United States v. Hall, 171 Fed. Rep. 214 (E.D. Wis. 1909). As to the Cheyenne River Reservation, a lower federal court held in 1911 that the reservation lapsed when title to reservation lands changed hands. United States v. LaPlant, 200 F. 92 (D.S.D. 1911). Both courts applied the wrong legal standard, the Supreme Court having since held that neither citizenship (Celestine, above) nor land transfers (Seymour v. Superintendent, above) affects reservation status. When the Cheyenne River issue reached the Supreme Court, the LaPlant decision was argued vigorously by the state as indicating disestablishment of the reservation. However, the Supreme Court held against the state without reference to the LaPlant decision, simply noting on the point that "Neither sovereign [state or federal government] dominated the jurisdictional history . . . " of the area. Solem, at 479.

By Rosebud and Solem standards, then, the allotment of the Oneida Reservation was a failure. Even though the land transfer legislated by the General Allotment Act did take place at Oneida, the cultural changes contemplated but not legislated in the act did not follow. The Oneidas remained on the reservation and remained continuously under federal supervision. Not only have the Oneidas remained, they have thrived. The Oneida

tribal government currently has an annual budget of approximately 45 million dollars. The overwhelming majority of that budget is generated by tribal enterprises, including bingo, a convenience store, gas stations, and hotel and convention center. With those funds the tribe performs a number of governmental services for all residents of the reservation, including a transportation system, a retirement facility for elderly reservation residents, a K-8 school for tribal children, a housing program and recreation facilities for all ages. In addition, the Bureau of Indian Affairs funds a health clinic and other services on the reservation. By any criterion other than land ownership, the Indian character of the Oneida Reservation is pervasive and conspicuous.

In the end, the only fact that even hints of de facto disestablishment of the Oneida Reservation is the change in land ownership from predominantly Indian to predominantly non-Indian. But as noted above, the Supreme Court has determined that that fact alone does not mean loss of reservation status. See Celestine, above. Just as persuasive as Supreme Court cases is the logical consequence of arguing disestablishment from land ownership. The General Allotment Act that precipitated the transfer of Indian lands into non-Indian hands was general, mandatory legislation. It applied to every reservation in the country save for a few expressed exceptions. As the statistical legacy of the act demonstrates, the act proved

to be very effective at shrinking tribal land holdings, not only at Oneida but across the country. Were the extent of land transfers taken as the primary basis for a disestablishment finding, then very few reservations would be safe from the charge. For both legal and practical reasons, then, land ownership cannot be the determinative factor in this inquiry. And if it is not the determinative factor, then it becomes clear that the Oneida Reservation remains intact.

Conclusion

A lawsuit is currently pending in federal court on the continued existence of the Oneida Reservation. In my opinion, the courts will ultimately determine that the Oneida Reservation remains intact. Whatever the outcome of the suit, though, there will be no clear winner. During the years that the litigation is likely to drag on, there will be considerable loss of good will and tolerance between the Oneidas and their non-Indian neighbors, as well as substantial expenditures on lawyers' fees. In addition, the litigation will not resolve the underlying tension between the Oneida and non-Indian communities. Whoever prevails in the litigation, the Oneidas will always be here. Due to the size of the Oneida community, considerable portions of the reservation would be deemed a dependent Indian community under federal and tribal jurisdiction. See 18 U.S.C. section 1151(b); see also United States v. Martine, 442 F.2d 1022 (10th Cir. 1971), where a dependent

Indian community was found outside reservation boundaries. This litigation, then, is not the ultimate solution to the "Indian problem" any more than was the General Allotment Act.

In the end, the Oneidas and local governments must accept the reality that they are neighbors and work out between themselves some terms for peaceful coexistence. States and local governments have worked with tribes in other places to resolve issues of mutual concern. Those efforts have resulted in arrangements such as cross-deputization of police, detention of prisoners, and others. See Tribal-State Compact Act of 1978; Hearings on S.2502 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 15-16, 81-92 (1978); Cohen's Handbook on Federal Indian Law 380-81. While these particular arrangements may not be suitable here, the approach taken by those communities and tribes is suitable and desirable. Essentially, the tribe and local communities meet, thrash out their concerns, and devise a scheme addressing their particular concerns and circumstances. That process would be more effective here than any court decree.