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# TRIBAL PROPERTY: THE IOWA RESERVATION IN OKLAHOMA—AN APPLICATION OF *CELESTINE* THROUGH *JOHN*

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Once upon a time, not so very long ago, the United States District Attorney in Oklahoma City declared firmly and with conviction that "Oklahoma has no Indian Reservations."[1] He is not alone in his opinion. The fairy tale that there are no Indian reservations left in the state of Oklahoma commands the belief of a majority of persons.[2] However, a recent series of United States Supreme Court cases[3] requires a reexamination of this glib assumption. This paper will seek to define the test for disestablishment, diminishment, or alteration of reservation boundaries that has been developed in these cases and then to apply that test to one particularly well-qualified candidate for reclassification as an Oklahoma Indian reservation—the lands of the Iowa Indians.

## *The Test for Disestablishment, Diminishment, or Alteration of Reservation Boundaries*

Only Congress can disestablish, diminish, or alter the boundaries of an Indian reservation, and all tracts included within the reservation remain a part of that reservation until Congress acts to separate them therefrom.[4] Courts determine whether Congress did disestablish, diminish, or alter the boundaries of a reservation by looking to the sometimes elusive "intent of Congress" in the act, treaty ratification, or series of actions in question. Recent Supreme Court cases have considered how this congressional intent is to be determined.[5] These cases make clear that the decision as to whether Congress intends to disestablish, diminish, or alter

1. "Horse Betting Illegal Attorney Says," Oklahoma Daily, Feb. 5, 1979, at 5, col. 3, quoting Larry Patton.

2. Author's unscientific opinion polls of both Indians and non-Indians. Some people are willing to concede that parts of Osage County are a "mineral reserve."

3. United States v. John, 437 U.S. 634 (1978); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District Ct., 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); United States v. Celestine, 215 U.S. 278 (1909).

4. United States v. Celestine, 215 U.S. 278, 285 (1909).

5. United States v. John, 437 U.S. 634 (1978); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District Ct., 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); United States v. Celestine, 215 U.S. 278 (1909).

the boundaries is determined by the unique facts and circumstances of each individual case.

Congressional intent to disestablish, diminish, or alter reservation boundaries "must be clear, to overcome 'the general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' "[6] "Accordingly, the Court requires that the 'Congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' "[7]

The earlier cases looking at the question of disestablishment appeared to say that if disestablishment, diminishment, or alteration did not appear on the face of the act(s) of Congress under judicial scrutiny, the court could not inquire further and would be required to hold the reservation to be still intact.[8] In *Rosebud Sioux Tribe v. Kneip*,[9] the Court dispelled this appearance by saying: "[T]he notion that such express language in an Act is the *only* method by which congressional action may result in disestablishment is quite inconsistent with [the second clause of the *Mattz* test which is set out in the above paragraph]."[10] Therefore, express language in the act such as "do hereby cede, sell, relinquish, and convey to the United States all their right, title, claim and interest" is not necessarily required in order that a court find reservation boundaries to have been disestablished, diminished, or altered.

The cases have held that certain factors are irrelevant to a finding of congressional intent to disestablish, diminish, or alter reservation boundaries. Most important of these factors having no direct bearing on the question of congressional intent is the fact that the lands in question were opened for settlement. In *Mattz v. Arnett*,[11] it was argued by the director of the California Department of Fish and Game that such an opening to homesteaders militated against a continuation of reservation

6. DeCoteau v. District Ct., 420 U.S. 425, 444 (1975), *quoting from* Mattz v. Arnett, 411 U.S. 481, 505 (1973).

7. DeCoteau v. District Ct., 420 U.S. 425, 444 (1975), *quoting from* Mattz v. Arnett, 412 U.S. 481, 505 (1973).

8. Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962).

9. 430 U.S. 584, 588 n.4 (1977).

10. *Id.*

11. 412 U.S. 481, 496 (1973).

status. The Court concluded that this was a misreading of the effect of the 1892 act for the allotment of lands on the Klamath River Indian Reservation. The Court said:

> The meaning of those terms [in the Klamath River Act] is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388. That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. *Its 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.*[12]

A reservation will not be held to be disestablished, diminished or altered merely because patents to lands thereon located have been issued. This was recognized in *United States v. Celestine*,[13] and was codified in Title 18 of the United States Code. Title 18 deals with Crimes and Criminal Procedure.[14] Section 1152 of this title provides that: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."[15]

Section 1151 of the same title defines "Indian country" as including, *inter alia*: "[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*. . . ."[16] Accordingly, the mere issuance of patents does not destroy reservation status.

Another "nonfactor" in the determination of congressional intent is the fact, standing alone, that *some* unallotted lands located on the reservation were ceded by the tribe. In *DeCoteau v. District Court*,[17] the Sisseton-Wahpeton allotment agreement there under construction was distinguished from other allotment agreements of the period. The Sisseton-Wahpeton agreement was

12. *Id.* (emphasis added).

13. 215 U.S. 278, 285 (1909).

14. While on their face these sections are concerned only with criminal jurisdiction, the Court has recognized that they generally apply as well to questions of civil jurisdiction. DeCoteau v. District Ct., 420 U.S. 425, 427 n.2 (1975).

15. 18 U.S.C. § 1152 (1970).

16. 18 U.S.C. § 1151(a) (1970) (emphasis added).

17. 420 U.S. 425, 439 (1975).

held to have disestablished that reservation, while the other agreements had not disestablished their respective reservations. The Court said:

> [T]he Congress included the Sisseton-Wahpeton Agreement in a comprehensive Act which also ratified several other agreements providing for the outright cession of surplus reservation lands[18] to the Government. The other agreements employed cession language virtually identical to that in the Sisseton-Wahpeton Agreement, but in these other cases the Indians sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservations.[19]

All of this is to say that "[E]ven a *cession* of lands, so long as it is not a cession of *all* unallotted lands, will not result in a termination of the reservation."[20]

Referring to a reservation in the past tense, as where the allotment act referred to "what *was* [the] Klamath River Reservation,"[21] does not indicate any clear intent of Congress to terminate the reservation directly or by innuendo.[22] Nor does the fact that the actions of Congress being interpreted were unilateral actions by that body without the consent of the affected tribe have any direct bearing on the question of disestablishment.[23] The question of disestablishment is one of congressional intent. That intent can exist with or without the consent of the tribe.[24]

It appeared from the earlier cases that certain factors were determinative of congressional intent.[25] However, *Kneip*[26] declares that these factors are not absolutes.

> The focus of our inquiry is congressional intent. This Court has pointed in its prior decisions to factors from which intent is

18. Portions of the reservation remaining after allotment.

19. DeCoteau v. District Ct., 420 U.S. 425, 439 (1975).

20. Pipestem, *The Journey from Ex Parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 AM. INDIAN L. REV. 1, 40 (1978) [hereinafter cited as Pipestem].

21. Mattz v. Arnett, 412 U.S. 481, 498 (1973) (emphasis added).

22. *Id.*

23. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977).

24. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), which held that the United States Congress possessed the authority to unilaterally abrogate the provisions of an Indian treaty.

25. Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962).

26. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

> inferred. The dissent erroneously seizes upon several factors and presents them as apparent absolutes, post, at 1378-1379. This, however, misapprehends the nature of our inquiry, which is to inquire whether a congressional determination to terminate is "expressed on the face of the Act or [is] clear from the surrounding circumstances and legislative history."[27]

One of these factors, considered useful, although not absolute, in determining congressional intent to disestablish, diminish, or alter reservation boundaries is the "jurisdictional history" over the lands in controversy. In *Mattz* and *Seymour*, the conclusions that the involved reservations had not been terminated were "reinforced by repeated recognition of the reservation status of the land . . . by the Department of the Interior and by Congress."[28]

Jurisdictional history contributed to an opposite result in *Kneip*,[29] in which the reservation was held to have been diminished, the Court saying:

> Since state jurisdiction over the area within a reservation's boundaries is quite limited, 18 USC § 1151; *McClanahan v. Arizona Tax Comm'n, Williams v. Lee, Worcester v. Georgia*, [citations omitted], the fact that neither Congress nor the Department of Indian Affairs [*sic*] has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the "jurisdictional history." The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges. We are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.[30]

Another factor that the Court has found useful in determining congressional intent is the presence or absence of express language of termination. During the era of allotment, numerous bills were introduced and passed that expressly provided for the

27. *Id.* at 588 n.4, *quoting from* Mattz v. Arnett, 412 U.S. 481, 505 (1973).

28. Mattz v. Arnett, 412 U.S. 481, 505 (1973). *See also* United States v. John, 437 U.S. 634 (1978); Seymour v. Superintendent, 368 U.S. 351, 356 (1962).

29. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-605 (1977).

30. *Id.*

termination of reservations and did so in unequivocal terms. The Court sees this as an indication that "Congress was fully aware of the means by which termination could be effected."[31] The absence of such express terminology tends to negate an intent to terminate.[32] Ambiguous expressions will be construed in favor of the Indians.[33]

*The Test Applied to the Iowa Lands in Oklahoma*

The Iowa Tribe had emigrated from Nebraska to Kansas to Oklahoma, being swept in front of America's "manifestly destined" westward expansion. Their reservation in Oklahoma was created by Executive Order of Chester A. Arthur on August 15, 1883:

> It is hereby ordered that the following-described tract of country in the Indian Territory, viz: Commencing at the point where the Deep Fork of the Canadian River intersects the west boundary of the Sac and Fox Reservation; thence north along said west boundary to the south bank of the Cimarron River; thence up said Cimarron River to the Indian meridian; thence south along said Indian meridian to the Deep Fork of the Canadian River; thence down said Deep Fork to the place of beginning, be, and the same hereby is, set apart for the permanent use and occupation of the Iowa and such other Indians as the Secretary of the Interior may see fit to locate thereon.[34]

On May 20, 1890, the Iowa Tribe accepted an allotment agreement concerning the above created reservation. This agreement, along with that made with the Sac and Fox, was ratified by Congress on February 13, 1891.[35] It is interesting to note that both agreements were included in the same congressional enactment because both contain language indicating that the congressional intent was other than disestablishment. The present discussion will be limited to analysis of the Iowa agreement.

Article I of the Iowa Agreement provides:

31. Mattz v. Arnett, 412 U.S. 481, 504 (1973).

32. *Id.*

33. DeCoteau v. District Ct., 420 U.S. 425, 444 (1975), *quoting from* McClanahan v. Arizona Tax Comm'n, 441 U.S. 164, 174 (1973).

34. Executive Order of Chester A. Arthur, Aug. 15, 1883, in 1 C. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 843 (2d ed. 1904).

35. 26 Stat. 749 (1891).

> The said Iowa Tribe of Indians, residing and having their homes thereon, *upon the conditions hereinafter expressed,* do hereby surrender and relinquish to the United States all their right, title, claim and interest in and to and over the following described tract of country in the Indian Territory, namely. . . .[36]

Standing alone, this language is equivalent to language the Supreme Court has pronounced to be "precisely suited to this purpose [of disestablishment],"[37] evidencing "an unmistakeable baseline purpose of disestablishment."[38]

However, this first article includes the phrase, "Upon the conditions hereinafter expressed," which later conditions, at the very least, cast a doubt upon the intentions of Congress and thereby trigger the legal maxim of *McClanahan v. Arizona Tax Commission*[39] that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."[40]

The most striking of these later conditions appear in Articles V and XII of the Agreement. Articles II and III also contain language that seemingly manifests a congressional intention of continued reservation status.[41] Article V states:

> *There shall be excepted from the operation of this agreement* a tract of land, not exceeding ten acres in a square form, including the church and school house and grave-yard at or near the Iowa village, and ten acres of land shall belong to said Iowa tribe of Indians in common so long as they shall use the same for religious, educational, and burial purposes for their said Tribe—but whenever they shall cease to use the same for such purposes for their Tribe, said tract of land shall belong to the United States.[42]

In accordance with the provisions of Article V, this ten-acre tract was "*reserved* from allotment and public entry."[43] Its loca-

36. 26 Stat. 749, 754 (1891) (emphasis added).

37. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 592 (1977), *quoting* DeCoteau v. District Ct., 420 U.S. 425, 445 (1975).

38. *Id.*

39. 411 U.S. 164 (1973).

40. *Id.* at 174.

41. For a discerning discussion of these, *see* Pipestem, *supra* note 20, at 43-45.

42. 26 Stat. 749, 755 (1891) (emphasis added).

43. Memorandum from Anadarko Field Solicitor to Anadarko Area Director, "Title Status of a Ten-acre Tract Reserved for the Iowa Tribe of Indians of Oklahoma," at p. 2 (Sept. 1, 1963).

tion was noted in a Departmental Order of November 6, 1912.[44] The tract is shown on the allotment schedule as having been set aside for the Iowa Tribe and no patent therefor has ever been issued.[45] The Bureau of Indian Affairs still regards this tract as trust land of the Iowa Tribe.[46] Under the "jurisdictional history" factor considered important in the cases,[47] this treatment of the land offers strong evidence negating disestablishment. The Court of Claims has also treated the Iowa lands as a continuing reservation.[48] The Court described the Iowa property in 1929 as "The *reservation* occupied by [the Iowas],"[49] and of Article V, says, "A stipulated *reservation* of acreage was made for religious and educational purposes. . . ."[50]

This brings us to a consideration of what the word "excepted" means. *Webster's New Collegiate Dictionary* defines "except:" "to take out, except from"; "to take or leave out, except from"; "to take or leave out from a number or a whole: exclude"; "to take exception: object."[51]

Under a well-recognized principle of construction,[52] courts will construe treaties of the United States with Indians "as 'that unlettered people' understood it, and 'as justice and reason demand.' "[53]

An argument that the doctrine developed in this line of cases applies only to *treaties* with Indians can be countered with the "plain and ordinary meaning" doctrine and the general rule of *McClanahan*.[54]

The courts have construed the word "except" in its plain meaning. In *Conley v. Ballinger*,[55] the Supreme Court held the language: "The Wyandotte Nation hereby cede and relinquish to

44. *Id.*

45. *Id.*

46. *Id.* at 3.

47. See text accompanying notes 28-30 *supra*.

48. Iowa Tribe of Indians v. United States, 68 Ct. Cl. 585 (1929).

49. *Id.* at 587 (emphasis added).

50. *Id.* at 604 (emphasis added). A search of legislation subsequent to the allotment agreement reveals that none of this legislation deals even tangentially with the issue of continued reservation status *vel non*.

51. WEBSTER'S NEW COLLEGIATE DICTIONARY 398 (1977).

52. Menominee Tribe v. United States, 391 U.S. 404 (1968); Marlin v. Lewallen, 276 U.S. 58 (1928); Jones v. Meehan, 175 U.S. 1 (1899).

53. Menominee Tribe v. United States, 391 U.S. 404, 406 n.2 (1968), *quoting* United States v. Winans, 198 U.S. 371, 380-81 (1905).

54. See text accompanying notes 6, 33, 39, and 40, *supra*.

55. 216 U.S. 84 (1910).

the United States all their right, title and interest in and to the tract of country . . . [description] . . . *except* as follows, viz: The portion now inclosed as a public burying ground shall be permanently reserved and appropriated for that purpose; . . ."[56]

The Court held that "except" retained the tribal interest in the land so described.[57] Reservation status *vel non* was not in issue in the case.

It appears then, that at least this ten-acre tract of the Iowa lands continues its reservation status.

Article XII of the Iowa Allotment Agreement states:

> It is further agreed that when said allotments are being made, the Chief of the Iowas may select an additional ten acres in a square form for the use of said tribe in said reservation, conforming in boundaries to the legal subdivisions of land therein, which shall be held by said tribe in common but when abandoned by said tribe shall become the property of the United States.[58]

This land was selected as provided for in the Agreement.[59] It was sold in 1902 under Guthrie cash entry by the Bureau of Land Management.[60] This sale might be held invalid because it may have been outside the scope of the Bureau of Land Management's authority.[61]

In any event, the language indicating that simultaneously with the allotment process, the Iowa chief may select an additional ten-acre tract "in said *reservation*" points to a congressional intent that the reservation status should continue through the allotment period and thereafter.[62]

Other language throughout the Agreement contemplates a reservation after allotment. Article II declares that: "Each and every member of said Iowa Tribe of Indians shall be entitled to select and

56. *Id.* at 85 (emphasis added).

57. *See also* Adams v. Osage Tribe, 59 F.2d 653, 655 (10th Cir. 1910): "Except" is "appropriate when some part or parcel of the thing granted is withdrawn from the operation of the conveyance," and in AG 6:658, 663 (1854), "except" meant that described lands were withdrawn from the terms of the agreement.

58. 26 Stat. 749, 757 (1891).

59. Interview, William Pruner, Bureau of Indian Affairs, Shawnee Agency, with author (Nov. 2, 1979).

60. *Id.*

61. Harjo v. Kleppe, 420 F. Supp. 1110 (1976).

62. Pipestem, *supra* note 20, at 45.

locate upon said *reservation* or tract of Country eighty acres of land which shall be allotted to such Indian in severalty. . . ."[63] Article III provides, *inter alia*: "and when all of said allotments are made and approved, then the residue of *said reservation*, except as hereinafter stated, [Articles V and XII] shall, as far as said Iowa Indians are concerned, become public land of the United States."[64]

As was discussed earlier in this paper,[65] issuance of patents within a reservation is not dispositive to a conclusion of reservation termination, nor is the opening of reservation lands to settlement dispositive of the issue.[66]

Furthermore, the Court has determined that the intent of the General Allotment Act[67] 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."[68]

The Iowa Allotment Agreement can be analogized to the General Allotment Act. As one prominent expert on Oklahoma Indian land law commented: "The [Iowa] agreement does not specifically provide that allotments shall be made subject to the General Allotment Act, as is customary, but, the provisions of the agreement are substantially identical with that act and its amendments, and will no doubt, receive a similar construction."[69]

It should also be noted that the Iowa Agreement compares with the agreements discussed in *DeCoteau*, wherein the reservations were held not to be disestablished.[70] Even if the language of Article I of the Iowa Agreement is viewed as language of outright cession,[71] the clause, "Upon the conditions hereinafter expressed," which conditions include Articles V and XII, negates a conclusion that *all* unallotted lands were to be ceded.

Congress knew how to provide expressly for the termination of reservations and did so in many instances. The absence of such

63. 26 Stat. 749, 754 (1891) (emphasis added.
64. 26 Stat. 749, 755 (1891) (emphasis added).
65. See text accompanying notes 13-16, *supra.*
66. See text accompanying notes 11 and 12, *supra.*
67. 24 Stat. 388 (1887).
68. Mattz v. Arnett, 412 U.S. 481, 496 (1973) (emphasis added).
69. L. MILLS, OKLAHOMA INDIAN LAND LAWS § 381 (2d ed. 1924).
70. See text accompanying notes 17-20, *supra.*
71. But see text accompanying notes 36-40, *supra.*

express terms in the Iowa Agreement also tends to negate congressional intent to terminate the Iowa Reservation.[72]

### *Conclusion*

In view of the foregoing, this writer tends to agree with the statement of the prominent Indian law authority who summarized the situation in regard to the Iowa lands in Oklahoma as follows: "It can be forcefully argued that the language of the Iowa Allotment Agreement is ambiguous on the disestablishment question and, in fact, in applying the judicial doctrine of the Surpeme Court either continuation or diminishment of the reservation boundaries is strongly indicated rather than termination."[73]

The congressional intent to disestablish, diminish, or alter the boundaries is not clearly expressed on the face of the Iowa Allotment Agreement nor is it clear from either the surrounding circumstances looked to by the Supreme Court in the cases or from the legislative history.[74] Therefore, under the rule that doubtful and ambiguous expressions are to be resolved in favor of the Indians,[75] it appears that an Iowa Indian Reservation is alive and well in the state of Oklahoma.

72. See text accompanying notes 31-33, *supra.*
73. Pipestem, *supra* note 20, at 45.
74. Mattz v. Arnett, 412 U.S. 481, 505 (1973).
75. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174 (1973).