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Negotiating the Value of New York Reservation Lands

The Tribal Spectrum.

Two protracted calamities befell New York tribes in the republic's first decades. One resulted from the fact that greed-driven, politically well-connected individuals acquired fee title to Seneca lands, and prevailed on the federal government to abandon its moral and treaty commitments to protect the Senecas' "Indian Title." The second calamity resulted from the failure of New York State to provide consistent guardianship for tribes residing on State-created reservations, most obviously manifested in the State's refusal on many occasions to pay market rates when buying protected reservation lands despite the State's monopoly of the right to purchase such lands. The diversity of tribal groups domiciled from Long Island to Niagara discouraged New York from devising comprehensive trusteeship policies similar to those implemented in Massachusetts or Connecticut. The legacy of the "Six Nations" Confederacy that had linked together some but not all New York tribal groups also discouraged uniformity of treatment, as did federal commitments to some but not all New York tribes.

Within New York's borders were located tribes and tribally descended groups spanning almost the entire spectrum present in the nation as a whole. After nearly two centuries of interaction with colonial and then U.S. governments, tribes differed vastly in history, culture, size, land-holding status, military capacity and political organization. As Supreme Court Justice William Johnson observed in 1810, the "State of the Indian nations" was "very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the States; others have, by treaty, acknowledged that they hold their national existence at the will of the State within which they reside; others retain a limited

sovereignty and the absolute proprietorship of their soil.”¹ Johnson’s first category might have included groups still dwelling on Virginia’s pre-Revolutionary reservations, or the “plantations” established by colonial Massachusetts Bay for “Praying Indians.” Johnson’s intermediate category of state-regulated but largely autonomous tribal “nations” might have included the Penobscot and Passamaquoddy tribes of Maine and the Oneidas of New York State. Johnson’s third category, of tribes retaining “limited sovereignty”, would certainly have included southeastern tribes such as the Cherokees and Creeks, and probably also the Senecas.

A somewhat similar tripartite categorization appeared in the 1830 *American Annual*

Register:

The federal government...claimed sovereignty, over the whole territory as defined by the [Paris] treaty of 1783, to the exclusion of all civilized powers; but did not assume to exercise any of its rights over the Indian tribes, which existed as distinct communities. Some of the tribes had so far diminished in number as to cease to be objects of national concern. Others, though more numerous, and still preserving their individuality and peculiar laws, had formed relations with the state governments, anterior to the adoption of the federal constitution, which in some measure removed them from the jurisdiction of the general government. Such were the Six Nations, three of whom, the Oneidas, the Onondagas and the Cayugas, previous to that period, had ceded their lands to the state of New York, and accepted of a title to the parts reserved for their own use, as sub-grantees of the state.²

Not surprisingly, analysts often placed New York tribes in the middle category of tripartite schemes, as President Washington had done in 1792.³ In yet another variant, Georgia Congressman John Forsyth observed on March 10, 1826, that

The situation of the Indian tribes within the United States was known to every one to be very peculiar. The Government of the United States had, from the very beginning, been governed by contradictory principles in its conduct towards them. In some of the States the Indians are considered as a part of the population, and are governed by the State laws as dependents or citizens. In other States they seem to be subjected to a mixed authority, consisting in part of the

1 Separate Opinion in *Fletcher v. Peck*.

2 *American Annual Register for the Years 1827-8-9*, New York: E. & G.W. Blunt, 1830, 73-74.

3 See above, page 161.

authority of the United States, and partly of that of the State; while in other States, the whole authority over them is usurped by the United States. New York he considered of the second class; the new States and the Territories as forming the third; and all the other States containing the Indians, except those blessed with the presence of Creeks and Cherokees, as the first. North and South Carolina, and Georgia, and Tennessee, have the benefit of a peculiar code, an examination into which will no doubt hereafter be made. The present inquiry relates to those Indians who are placed under a mixed government, made of that of the United States, and that of the State of New York.

Forsyth suggested that New York State's "mixed" tribal situation shared some features with his own State of Georgia, but was in other ways unique.

New York Congressman Henry Storrs supplemented Forsyth's remarks by attempting to distinguish *among* New York's various tribes. "The Stockbridge and Brotherton tribes," he explained to his House colleagues,

are treated, in every sense, as subjects of the State jurisdiction; but other tribes, as the Senecas and Oneidas, are not considered so. Two or three years ago, it was the opinion of the Court of Errors in that State, on a question whether an Indian of the Oneida tribe could inherit Revolutionary bounty lands from his father, that some of these tribes were independent nations, and not under allegiance to the State. In another case, of a homicide by an Indian on the Seneca reservation, the jurisdiction of the State over the party was questioned in the Courts, and it was found so difficult to maintain the jurisdiction, that the party was pardoned, and a general act was passed, asserting the jurisdiction. Some of the tribes in the State hold their lands under the State; but others retain their original title as tribes or nations; Commissioners have sometimes been appointed to form treaties with them.⁴

Storrs did not elaborate, but his summary made clear that a wide range of legal statuses existed within New York State, and that the particular mix of federal and State authority could differ from tribe to tribe. Storrs presumably had the Senecas principally in mind when he spoke of tribes within New York State that retained "their original title." As such, the Senecas fit into a category that was well-recognized nationally, with counterparts in Georgia and elsewhere. The legal status of other New York tribes was far less well understood, even by New Yorkers. Analysts recognized that there was some sort of difference between the Senecas and other New York tribes, but characterized this difference in

numerous ways. Thomas McKenney, Superintendent of the War Department’s Indian Office, remarked for example to Jasper Parrish on June 4, 1829, that New York State possessed “the reversion title to all Indian lands within it, except those owned by the Senecas.”⁵ Others spoke of the State holding a “right of preemption” instead of a reversionary right to State-created tribal reservations.⁶ Still others referred to the State as holding the “fee” to these reservations. In a letter dated December 27, 1837, to Commissioner of Indian Affairs Carey A. Harris, Federal Treaty Commissioner Ransom Gillet stated that

The fee of their [St. Regis] reservation belongs to the state. Before this tribe can bind itself positively to emigrate, it must be certain of a new home, & also make a treaty with the Governor of the state for the extinguishment of their interest in these lands.

In the same letter, Gillett described the lands of the Oneidas as legally “situated like the St. Regis lands in this state.”⁷ The person from whom Gillet had taken over responsibility for negotiating with New York tribes, the Reverend John Schermerhorn, had on January 10, 1837, similarly informed Commissioner Harris that, “The State of New York owns the fee of the lands still professedly the Oneidas, Brothertowns, Onondagas, and St. Regis. The Ogden Company own the right of pre-emption to the Seneca and Tuscarora Reservations.”⁸

Right of preemption, reversion title, fee; use of any of these terms to contrast the status of the Senecas, who retained aboriginal “Indian Title,” to that of New York tribes holding State-granted reservation lands obscured as much as it clarified, because the difference between the status of the Senecas and that of these other New York tribes extended beyond the question of

4 *Register of Debates in Congress*, 19th Cong., 1st Sess. (1826), 1598-99.

5 Kohn 86-87.

6 See for example Secretary of War Henry Knox to New York Governor George Clinton, August 17, 1791, ASPIA 1:169.

7 Kohn 100, citing National Archives, Bureau of Indian Affairs, Microfilm M-234.

8 Kohn 99.

who owned the fee, right of preemption or right of reversion. The Senecas and other New York tribes were not in different parts of one land-holding category, they were in different categories.

New York State’s Full-Value Tribal Reservations.

New York was partly responsible for this confusion, in failing to distinguish clearly between full-value State land grants and low-value aboriginal “Indian Title.” From 1788 forward, the State’s plan seems to have been to replace “Indian Title” with land grants that could in time become alienable fee title holdings. Though described as for the “use” of tribes, and typically not freely alienable, State reservation lands allocated to tribes were evidently intended to be permanent, full-value grants. The sale of these State-granted lands was restricted by the State only to protect tribes, and the State could not expect to reclaim these lands unless the grantee decided to sell or simply disappeared.

In September of 1788, while negotiating treaties with the Oneidas and Onondagas by which they ceded “all” their “Indian Title” claims to the State, Governor George Clinton had not elaborated the State’s long-term intentions. But the Cayugas held out longer and asked more questions. On February 23, 1789, just days before the inception of the new federal government, Clinton explained to the Cayugas “more fully and particularly” than to the Onondagas and Oneidas why the State wished to extend its ordinary jurisdiction over their persons and their lands:

After the most mature Deliberation we...[asked] our Brethren to grant us their Lands so that we might take them under our particular Care and Protection; but that our Brethren should have Land to work on and procure Subsistence, we laid out Land sufficient for their respective nations, in case their Numbers should be ten times more than they are at present.

The Oneidas, who are the most numerous Nation, have Land reserved for them in case they live as we do [i.e., by farming] to support twelve thousand Souls.

To the Onondagas, who are less numerous, and whose Hunting will continue longer, was reserved Land sufficient to support four thousand Souls; this is more than the two Nations consisted of in their most flourishing Days....

We reserved to our Brethren the Onondagas and Oneidas a Tract of Country sufficient for ages to come, should they increase in the same Proportion as the white People. But Brothers we have done more than this; we found if their Hunting decreased they would be obliged to turn their Attention more to the Cultivation of the Earth, as you must do; whereupon we gave them Money to purchase Cattle and other Stock...every year to the Oneidas six hundred Dollars, and to the Onondagas five hundred Dollars; and we appeal to you and to our Sisters whether either of those Sums is not more than your Nation annually got by Hunting.⁹

Clinton spoke of a future in which the Onondagas, Oneidas and Cayugas would still be autonomous tribes, but not therefore beyond the capacity of the State to regulate.

Because members of these tribes were not citizens, special arrangements were made to protect their welfare. One provision of the 1788 Oneida Treaty for example stated that “The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation.” This provision occasioned a letter of explanation addressed by the Governor to the Oneidas’ Wolf Clan on November 13, 1790.

“Brothers,” Clinton began,

I have received your letter of the 27th of last Month. I am sorry to hear that your Nation is divided into Parties and that...animosities exist among you. This ought not to be. You are brothers of the same Colour and Blood, and you ought therefore to love one another. It is a Duty required of you by the Great Spirit, and you cannot expect his Blessing to rest upon your Nation unless you obey his Will...

As to the [1788] Agreement which we mutually entered into at Fort Stanwix...you have no Right or Authority to lease any Part of the Reserved Lands except a Tract of four Miles in Breadth on the South Side of it and even that for no longer term at any one Time than that prescribed by the Agreement. That all the rest of the reserved Lands is to remain for the...accommodation of your nation....This was made binding by the Agreement at the Request of your Nation....The Agreement between us as you wisely observe is for our mutual

9 Hough 295-97. The Oneidas then numbered about 1200, the Onondagas 400.

good. It must therefore stand inviolate and we are bound to each other to observe it in all its Parts. If therefore any of your People have contrary to it leased any of the Reserved Lands at Canaghseraga, they have done very wrong and so have the White People who have taken such Leases; and if any of them have already or shall hereafter attempt to settle on those Lands the Government of the State will on the Complaint of your Nation and being furnished with the Names of the Lessors cause them to be removed....

Brothers, It is not easy for me to advise you with respect to the Division which you propose to make of the reserved lands among your different Tribes. I can only say that it does not appear to me to be repugnant to our Agreement if unanimously agreed upon by you...It may be proper at the same Time to observe that should such Divisions take Place it will not authorize the different Tribes to sell or lease any Part of their shares as this would be contrary to our Agreement.

Agreeable to your Request, I send you enclosed a Copy of our [State] Laws respecting Debts contracted by Indians with White People by which you will observe the Care our Great Men take to prevent Impositions from being committed upon you.

Brothers, I address this Letter to your Tribe because it is an Answer to your Letter to me; but it is my desire that it may be read to the whole Nation as I never say any Thing but I wish them all to hear.¹⁰

New York State had assumed responsibility for safeguarding the interests of the Oneidas, Onondagas and Cayugas as they moved from hunting to agriculture. Many details had not yet been filled in, for example whether the Oneidas could by their own decision divide their State reservation among themselves and manage as distinct bands the lands thus divided. But all such questions could be handled by the State without recourse to the federal government because while still an internally self-regulating tribe controlling valuable assets, the Oneidas were no longer a politically independent tribe.

On February 21, 1791, the Legislature passed “An Act for the Relief of the Indians Residing in Brother-Town, and New Stockbridge” providing

That it shall and may be lawful for the male Indians, residing in Brother-Town and New Stockbridge, above the age of twenty one years...to choose annually three persons as trustees, to lay out such part of the lands in Brother-Town, or New Stockbridge, for the

10 Newberry Library, Ayer MSS., NA 644.

separate improvement of the several families of Indians residing in Brother-Town as shall be deemed necessary by the said trustees so to be chosen.

And be it further enacted by the authority aforesaid, That the said trustees shall lay out for each family, a sufficient quantity of land for a separate improvement and shall cause the bounds of each improvement to be properly marked and distinguished, and the description thereof to be entered in the clerk's book.

And be it further enacted by the authority aforesaid, That every person having a separate improvement, so laid out to him by the said trustees, and entered in the said clerk's book, the same shall remain to such person and his family for improvement, and shall enable such person to maintain an action for any trespass which may be committed by any white person or persons, on the lands so laid out to him or her for improvement, in any court having cognizance of the same.¹¹

Individuals on these tribal reservations could hold only inheritable use rights, but could look forward to a time when these would be made freely alienable.

This State policy presupposed that if any portion of such a reservation was sold before separate tracts were allocated to individuals, market value would go to the tribe. This presumption had been implicit in remarks made by Governor Clinton during his 1788-89 negotiations with the Oneidas, Onondagas and Cayugas, and in 1795 was made explicit by Governor Clinton and other members of the Council of Revision when they vetoed the Legislature's plan to offer the Oneidas, Onondagas and Cayugas four shillings per acre for land whose market value was sixteen shillings.¹² The Legislature departed from State policy when it overrode this veto and on April 9, 1795, directed that these land rights were to be purchased from the Oneidas, Onondagas and Cayugas for four shillings per acre. Just how aberrant this was is confirmed by the fact that only ten days earlier, on March 31, 1795, the Legislature had passed an Act authorizing purchases of land at Brothertown at a "mean price" of "at least sixteen

11 *Laws of New York*, 14th Sess., Ch. 13.

12 See above, pages 253-54.

shillings per acre”---all the proceeds of which were to benefit Brothertown.¹³ The Legislature singled out the Oneidas, Onondagas and Cayugas for substandard payment at the very time that the Legislature was acting in a responsible manner as fiduciary trustee for Brothertown. Legislators may have illogically imagined that tribes in which the federal government was showing some interest could be safely mistreated by the State.

Chief Justice John Marshall’s 1812 Opinion Regarding State-Granted Tribal Lands.

That state-granted tribal reservations were inherently fully valued was underscored by an 1812 United States Supreme Court Opinion (*New Jersey vs. Wilson*) written by Chief Justice John Marshall.¹⁴ In 1758, New Jersey had extinguished all the negligibly valued “Indian Title” claims of the Delawares to “a considerable portion of lands in New Jersey.” In return, the Delawares had received a grant of New Jersey land, tax free. Then in 1801, the Delawares

having become desirous of . . . joining their brethren at Stockbridge, in the State of New York, they applied for, and obtained an Act of the Legislature of New Jersey, authorizing a sale of their land in that State. This Act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the Act under which they were purchased and settled on the Indians. . . . It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it. It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities.

Marshall praised the Delawares for negotiating a handsome profit on their New Jersey lands by selling them complete with the tax exemption earlier granted them by New

¹³ *Laws of New York*, 18th Sess., Ch. 41.

Jersey, which tried too late to rewrite a binding contract. Nor could the federal government alter this legitimate exercise of the state’s regulatory power over the sale of land rights that the state had itself granted to a tribe.

Realizing Full Value for New York State Tribal Reservation Lands.

The New York Legislature’s 1795 decision to pay far below market value for some but not all State-granted land rights was, as Governor Clinton had pointed out, an abuse of the State’s monopoly power of purchase and a rejection of the State’s commitment to function as a fiduciary trustee of the interests of State-regulated tribes.. Predictably, tribes and tribal advocates protested. Tribes could of course simply refuse to sell to the State. But the Removal effort provided tribes with new incentives to sell, as well as to secure market value.

In the years before Congress in 1825 authorized the federal government to pay the costs of Removal, financing emigration was a severe problem for tribes desiring to move west. One source of funds was voluntary donations, but tribes with valuable land rights to sell ought not to have been obliged to depend on donations, as Stockbridge chief Solomon Hendricks pointed out to Secretary of War Calhoun on February 11, 1825. The Stockbridge tribe, Hendricks told Calhoun, were seeking “the full value of the lands we claim in this State, whenever we are ready to emigrate to Green Bay, as the State has heretofore allowed us only two dollars per acre for our said lands.”¹⁵

14 7 Cranch 164-67.

15 Kohn 92.

Similarly, on March 30, 1818, John Sergeant, long-time missionary to the Stockbridge Mahicans, who followed them from Stockbridge, Massachusetts, when they moved to New Stockbridge, New York, had complained to Jedidiah Morse that

The Government of this State do not feel towards the Indian rights to landed property, as they have always felt in the New England States. They [New York State] buy out the Indian title for one price, which they fix without consulting the Indians; and sell it at another and advanced price, thus making a gain, often a large one, out of the Indians. The Stockbridge tribe have a good title to their lands, and understand the value of such property, and are not willing to sell their “birth rights, for a mess of pottage.”¹⁶

Sergeant’s point would have come through more clearly had he not used the term “Indian title” for New Stockbridge land. This land was held by what Sergeant accurately labeled “good title” and not by what was then usually called “Indian Title.” Even so, Sergeant effectively emphasized that the New Stockbridge Mahicans possessed valuable land rights, just as they had in Massachusetts, notwithstanding the fact that New York was backward in acknowledging this.

Official sentiment returned to favoring full value purchases of State reservation tribal land on February 11, 1829, when the Legislature mandated paying the Oneidas “a fair price for their lands” allowing only for the deduction of actual expenses. Improvements also were to be paid for, separately to the individuals responsible for such improvements.¹⁷ Not surprisingly, this reversal by the Legislature provoked a new round of tribal lobbying, to secure supplementary compensation for land rights sold *prior* to 1829 for less than full value.¹⁸

After 1829, tribes holding State reservation lands were in a strong bargaining position whenever they chose to relinquish land rights to the State. Such a sale was anticipated in the

16 Jedidiah Morse, *Report to the Secretary of War*, New Haven, 1822, Appendix 113.

17 *Laws of New York*, 52nd Sess., Ch. 29.

18 For an instance of successful lobbying for supplementary compensation, see *Laws of New York*, 58th Sess., Ch. 285, passed May 11, 1835.

1838 federal Treaty of Buffalo Creek, drafted by New York lawyer Ransom Gillet. The Oneida section of Gillet's Treaty specified that

The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.¹⁹

This, along with other sections of Gillet's Treaty, made detailed provision for *federal* extinguishment of the Oneidas' federally approved "Indian Title" claim to lands in Wisconsin acquired from the Menominees through the efforts of Eleazer Williams. But sale of the Oneidas' State reservation lands was a separate matter involving only the Oneidas and New York State, and was alluded to in the 1838 federal Treaty only as a background factor.

The Senecas in New York and the Oneidas in Wisconsin possessed only federally protected, low-value "Indian Title." In New York, the Oneidas possessed full-value land rights under State grant, whose sale was regulated by the State acting as guardian for this non-citizen tribal group. The State failed in its duty between 1795 and 1829, but thereafter acknowledged it.

¹⁹ Kappler 2:506.