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Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations

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GOVERNMENTAL POWER AND NEW YORK INDIAN LANDS—A REASSESSMENT OF A PERSISTENT PROBLEM OF FEDERAL-STATE RELATIONS*

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"INDIANS ON THE Warpath Here"[1]—so, in a headline more likely to amuse than to terrorize, a New York City tabloid recently characterized a federal court action by the Tuscarora Indians to invalidate, for lack of federal consent, the New York Power Authority's appropriation of reservation lands for construction of the Niagara River Power Project.[2] Through reports such as these, many learned for the first time that Indian tribes indeed still reside in New York—remnants of the once mighty Iroquois Confederacy, some 7,000 strong, on seven reservations of over 85,000 acres.[3] More significantly, the recent flurry of claims relating to New York Indians indicates that the problem of delineating federal and state authority over reservation lands, long a source of confusion and dispute, has not lost its capacity to generate controversy.

The broad bases for the traditional opposing positions, if not the resulting complications, may be simply stated. Assertions of an overriding federal power with respect to tribal lands rest in the first instance on the federal Constitution itself:[4] the authorization of congressional regulation of "commerce with the Indian tribes" and the national treaty-making power, which extends to agreements

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1. N. Y. Daily News, April 25, 1958, p. 4, col. 1-3.

2. Tuscarora Nation of Indians v. Power Authority, 164 F.Supp. 107 (W.D.N.Y. 1958), *modified* 257 F.2d 885 (2d Cir. 1958), *cert. denied* (Tuscarora Nations petition), 79 S. Ct. 66 (1958), *appeal docketed*, 27 U.S.L. WEEK 3087 (U.S. Sep. 19, 1958) (No. 386), *Sub. nom.* Johnson v. Tuscarora Nation of Indians.

3. The federally recognized tribes are the Senecas, Tonawandas, Tuscaroras, Onondagas, St. Regis, Oneidas, and Cayugas. Their reservations are the Allegany, Cattaraugus, Oil Springs, Tonawanda, Tuscarora, Onondaga and St. Regis. For detailed population and acreage figures, see Letter of Oscar L. Chapman, Secretary of the Interior, March 1, 1948, in S. Rep. No. 1137, 80th Cong., 2d Sess. 4 (1948) and "Background Data on Indians of New York," submitted by Orme Lewis, Assistant Secretary of the Interior, to the Speaker of the United States House of Representatives, Jan. 4, 1954, Plaintiff's Exhibit No. 7, Tuscarora Nations case, note 2 *supra*. This discussion is largely limited to these federally recognized tribes.

There are also two small Indian tribes on Long Island, the Shinnecocks and the Poosepatucks, residing on 250-acre and 50-acre reservations respectively. These tribes are recognized as Indians by the state, but not by the federal government. See text accompanying notes 130-132 *infra*.

4. See generally COHEN, HANDBOOK OF FEDERAL INDIAN LAW, ch. 5 [hereinafter cited as COHEN].

with the Indian tribes. Moreover, the Supreme Court has repeatedly recognized a pervœive federal power of guardianship over tribal Indians without reference to specific constitutional provisions: the "weakness" and "helplessness" of the Indian tribes, "so largely due to the course of dealing of the federal government with them," has led the Court to find a national "duty of protection, and with it the power" over these "wards of nation" owing "no allegiance to the States."[5] As to American Indians generally, then, the view that the national government possesses in effect "a new power, a power to regulate Indians,"[6] has been widely accepted. New York, however, has repeatedly argued the inapplicability of federal authority to the state's Indians. New York, after all, antedated the United States, and New York's Indian tribes, unlike those of most other states, are not settled on lands that were once part of the national domain.[7] And the continuation of state practices as to Indian matters even after the ratification of the Constitution, it is urged, supports New York's claim of a special guardianship authority over tribal lands.

The confusions engendered by these polar contentions barred any easy resolution of the conflict between state and federal jurisdictional claims. Yet the long history of uncertainty as to regulatory power over Indian affairs reveals a slowly emerging recognition that at least the special area of tribal land transactions is one of overriding federal concern. Only during the last two decades, however, has the allocation of power over Indian lands been clarified sufficiently to warrant the expectation that the recurring doubts and disputes may finally cease. That cessation has not yet come, as the Tuscarora litigation indicates. An examination of the turbulent history of New York Indian land matters,[8] then, may contribute to the long-needed reassessment of attitudes and actions by both Nation and State. Full acceptance of federal authority over alienation of tribal lands is amply warranted today. Such acknowledgment would carry profound implications for both governments: for the United States, a more consistent exercise of an oft-neglected responsibility; for New York, a

5. United States v. Kagama, 118 U.S. 375, 383-85 (1886); see also Chief Justice Marshall's opinions in Cherokee Nation v. Georgia, 5 Pet. (30 U.S.) 1 (1831), and Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832).

6. Rice, *The position of the American Indian in the Law of the United States, XVI J.* COMP. LEG. & INT.L L. (3d ser.) 78, 81 (1934); and see United States v. Ramsey, 271 U.S. 467, 471 (1926).

7. For the varied sources of tribal interests in New York reservation lands, from original title to purchase from private groups, see SPECIAL COMMITTEE APPOINTED BY THE N. Y. ASSEMBLY OF 1888 TO INVESTIGATE THE "INDIAN PROBLEM" OF THE STATE, REPORT, Doc. No. 51, 7 Ass. Docs., 112th Sess. (1889) (hereinafter cited as WHIPPLE REPORT); SENECAS AND OTHER INDIANS OF THE FIVE NATIONS OF NEW YORK, H. R. Doc. No. 1590, 63d Cong., 3d Sess. 11-25 (1915) (hereinafter cited as REEVES REPORT); COHEN, ch. 25; and Manley, *New York Indian Reservations in N. Y.* JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. Doc. (1948) No. 64, pp. 9-12.

8. For general historical background of New York Indian affairs, see IV LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 152-174 (1906) [hereinafter cited as LINCOLN]; WHIPPLE REPORT; REEVES REPORT; and COHEN, ch. 25.

simplification of its Constitution, a revision of its statutes, and a concentration of its energies on those Indian affairs properly within the state's authority. Protection of tribal lands—long the asserted policy of each government but, ironically, the frequent victim of federal-state disputes over the power of guardianship—may then be fully realized at last.

JURISDICTIONAL CONFLICTS AND CONFUSIONS, 1777-1942

Early State and National Action.

New York has asserted guardianship over Indian land transactions almost from the beginning of its independence. The first constitution of the state, adopted in 1777, contained a requirement that the legislature consent to any sale of Indian lands[9]—a provision whose operative portions have been retained in the constitution to this day.[10] Its purposes when it was proposed at the first constitutional convention by John Jay are considerably clearer than its present significance and validity. The 1777 preamble stated the need for state supervision succinctly:

> "AND WHEREAS, It is of great importance to the safety of this state that peace and amity with the Indians within the same be at all times supported and maintained; AND WHEREAS, The frauds too often practiced toward the said Indians, in contracts made for their lands, have, in divers instances, been productive of dangerous discontents and animosities; BE IT ORDAINED, That no purchases or contracts for the sale of lands made since the 14th day of October, in the year of our Lord one thousand seven hundred and seventy-five, or which may hereafter be made with or of the said Indians, within the limits of this state, shall be binding on the said Indians, or deemed valid, unless made under the authority and with the consent of the legislature of this state."[11]

The importance of "peace and amity" with the Indians had long been apparent to the colonists of New York.[12] The Iroquois Confederacy[13] was a powerful and influential group, politically the most advanced of all Indians north of Mexico, with vast territorial holdings and in control of important waterways and the western fur trade. Governmental supervision of land dealings

9. N.Y. CONST. art. 37 (1777).
10. N.Y. CONST. art. I, §13. The explanatory preamble of the 1777 provision was dropped, and the section assumed substantially its present form, in the Constitution of 1821. N.Y. CONST. art. VII, §12 (1821).
11. N.Y. CONST. art. 37 (1777).
12. See Goodell v. Jackson, 20 Johns. R. 693, 712 (N.Y. 1823).
13. The Iroquois were originally referred to as the Five Nations—the Seneca, Cayuga, Onondaga, Oneida and Mohawk tribes. When the Tuscaroras, who migrated from North Carolina during the eighteenth century, joined the Confederacy, the Iroquois became known as the Six Nations.

with the Iroquois had traditionally been viewed as vital to peaceful relations. Even the Dutch, who were more interested in promoting trade than in acquiring land, recognized Indian title as extinguishable only by treaty or purchase and, as early as 1629, required settlers "to satisfy the Indians for the land they shall settle upon."[14] The English, who assumed control of the colony in 1664, continued the policy of acquiring Indian lands by means other than force.[15] And a requirement strikingly similar to the Indian lands provision of the 1777 constitution was adopted by the second session of the colonial assembly in 1684: ". . . from henceforward noe Purchase of Lands from the Indians shall bee esteemed a good Title without Leave first had and obtained from the Governour. . . ."[16] Continuation of this protective policy was of particular importance when New York's initial constitution was framed. Indian attacks under English leadership were an active threat to the state's well-being. The western part of New York was still almost wholly held by the Iroquois. Conciliatory gestures were highly desirable, not only to abate present hostilities but to forestall fresh outbreaks which might be provoked by unscrupulous land dealings with Indians after peace was restored.[17]

Yet not even during the Revolutionary period were Indian affairs a matter of exclusively state concern. As early as 1775, the Continental Congress concluded a treaty to assure neutrality by the Iroquois, although individual tribes remained free to take sides.[18] And at the end of the Revolution, the national government established by the Articles of Confederation insisted that conclusion of a peace treaty with the Iroquois was its responsibility. New York, anxious to remove hostile tribes from the state, claimed the right to deal with the Indians separately, obstructed the central government's negotiations and indeed arrested some of the national agents. Despite New York opposition, the United States and the Iroquois concluded a treaty in 1784 in which the United States agreed that the Indian tribes "shall be secured in the possession" of specified New York lands[19]—the first in a series of still effective national guarantees of the Iroquois' right of occupancy.

National concern with Indian lands intensified after the ratification of the United States Constitution. Congress quickly acted to require federal supervision

14. IV LINCOLN 154.

15. As the struggle between England and France for control of North America mounted, the English assumed a general protectorate responsibility over the Iroquois by treaties in 1701 and 1726. IV *id.* at 155-59. See also the discussion of English policy in Jackson v. Porter, 13 Fed. Cas. 235 (No. 7143) (C.C. N.D. N.Y. 1825).

16. Law of Oct. 23, 1684, ch. 9, Laws of First General Assembly, 2d Sess., 1 NEW YORK COLONIAL LAWS 149 (1894 ed.).

17. VI REPORTS OF NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 202 (1938).

18. See Goodell v. Jackson, 20 Johns. R. 693, 712 (N.Y. 1823).

19. Treaty of Oct. 22, 1784, with the Six Nations, 7 Stat. 15.

of Indian land sales. The First Indian Non-Intercourse Act, adopted in 1790, provided that no sale of lands by "any Indians . . . within the United States . . . to any person . . . or to any state" could be valid "unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."[20] The Second Indian Non-Intercourse Act amplified this restriction in 1793 by making it a misdemeanor to negotiate with Indians for the purchase of their lands without federal authority, although it specifically permitted agents of a state to propose settlements of Indian claims to lands in the state, "in the presence, and with the approbation of the commissioner or commissioners of the United States."[21] Such federal consent restrictions were continued in subsequent legislation and form part of federal law today.[22] Moreover, continued unrest among the Iroquois led the United States to conclude a further treaty with the Iroquois in 1794.[23] In that treaty the boundaries of Seneca territory were defined and the United States "acknowledged all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, nor of their friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Other provisions contained identical promises as to "the lands reserved to the Oneida, Onondaga, and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations" and granted to the Six Nations of the Iroquois Confederacy an annuity to be spent for the purchase of goods for the Indians "by the superintendent appointed by the President for the affairs of the Six Nations."

On their face, the federal statutory restrictions seem applicable to New York tribal lands, as the treaty guarantees specifically are. Nevertheless, early land

20. Act of July 22, 1790, 1 Stat. 137.

21. Act of March 1, 1793, 1 Stat. 329.

22. 25 U.S.C. 177: "PURCHASES OR GRANTS OF LANDS FROM INDIANS. No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

As a result of an 1871 law, now 25 U.S.C. 71, Congress ceased dealing with Indians by treaty, but preserved preexisting treaty rights. Since then, the federal government has dealt with Indian matters through legislation.

23. Treaty of Nov. 11, 1794, with the Six Nations, 7 Stat. 44. An earlier treaty designed to end Iroquois attacks was not ratified. Treaty of Jan. 9, 1789, with the Six Nations, 7 Stat. 33.

purchases from New York Indians were not in all cases marked by federal participation and consent. In many instances, to be sure, the state acquired large tracts by treaties with Indian tribes under the authority of the United States and after negotiations participated in by federal officials.[24] Similarly, Indians sold lands to private persons pursuant to agreements under federal authority and with federal agents' participation.[25] However, between 1785 and 1790 and to some extent thereafter, New York acquired much land from Indians through treaties —perhaps as many as 200[26]—not participated in, though apparently known and not objected to, by the national government.[27]

The alienation of Indian lands without federal consent even after the federal Constitution, treaties and statutes became effective is probably explainable as a relatively unquestioned continuation of New York practices and notions of state power developed under the Articles of Confederation. Under the Articles, a vaguely defined state power over Indians was recognized[28] and national officials appeared to accept New York acquisitions of Indian lands.[29] State legislation, such as a New York law of 1785 directing state commissioners "to obtain a cession or grant, to the use of the people of this state, of such lands within this state now holden or claimed by the native Indians as such Indians are willing to dispose of on reasonable terms",[30] was thus an understandable product of prevalent views as to state power. Understandable too, before the passage of the federal Non-Intercourse Acts, were the New York legislature's actions in 1788 implementing

24. See, for example, the Mohawks' relinquishment of their claims to New York lands in exchange for the payment of $1,000 by the State. RELINQUISHMENT TO NEW YORK, BY THE MOHAWK NATION OF INDIANS, UNDER THE SANCTION OF THE UNITED STATES OF AMERICA, OF ALL CLAIMS TO LANDS IN THAT STATE, March 29, 1747, 7 Stat. 61.

25. See, for example, the agreement between Robert Morris and the Senecas, noting the presence and approval of a federal commissioner and stating that such procedure was "in pursuance of the act of Congress of the United States." Contract Entered Into, Under the Sanction of the United States of America, Between Robert Morris and the Seneka Nation of Indians, Sept. 15, 1797, 7 Stat., App. I.

26. COHEN 420, n. 24. A number of New York treaties with the Indians are reprinted in WHIPPLE REPORT, App. D, 190-382. See also United States v. Boylan, 265 Fed. 165 (2d Cir. 1920).

27. IV LINCOLN 646; Brief for the Warden and the State of New York, p. 9, New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

28. Thus, the Indian provision of the Articles expressly preserved "the legislative right of any State within its limits." ARTICLES OF CONFEDERATION, art. IX.

29. See Brief for the Warden and the State of New York, pp. 8-9, New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946). For example, Congress approved a compromise concluded by Masachusetts and New York, by which the states settled a dispute over Indian lands in western New York. By the agreement, New York's sovereignty over certain lands was recognized, but Massachusetts retained the right to purchase the lands from the Indians. Massachusetts in turn conveyed its preemptive rights to Robert Morris, who subsequently, in 1797, made an agreement with the Senecas, under federal supervision. See note 25, *supra*.

30. IV LINCOLN 164.

the State Constitution's ban on unauthorized private transactions in Indian lands.[31]

The momentum of such practices undoubtedly contributed to the relatively undiminished assertions of state power even after the manifestations of national authority in the 1790's. Additional laws appointing state agents to acquire tribal lands were enacted.[32] And as state purchases of lands diminished early in the nineteenth century, legislative regulations of Indian affairs proliferated.[33] State legal advisers for the Indians were provided and sale of intoxicants was prohibited. Moreover, the lack of federal attention during this period encouraged New York to assume an expanding guardianship over its Indians. Thus, an 1813 state law banning the cutting of lumber on tribal lands was made enforceable by the Federal Indian Agent, but in 1821 Indians complained that enforcement was inadequate and the state legislature transferred the task of guarding against intruders to the county district attorneys.[34]

The Emergence of Federal Supremacy over Tribal Lands During the Nineteenth Century

By the 1830's, then, state Indian legislation was fairly comprehensive and state control over Indian affairs was generally unquestioned. A series of events during this period, however, soon produced the first serious challenge to New York's supervision of Indian lands. In 1835, the state legislature began to authorize private leases of Seneca reservation lands. Settlers and railroad companies leased property on the Allegany reservation of the Senecas and the city of Salamanca became an important transfer point. Some of these leases were based on prior state permission; others were ratified by the legislature after execution; none, however, had been approved by the federal government.[35] Other events led to renewed federal interest in New York Indians. The state had

31. See Law of March 18, 1788, 2 N.Y. LAWS (Greenleaf ed.) 194. A 1788 resolution invalidated long-term leases of Indian lands made without the authorization required by the state constitution, and a statute subjected purchases and contracts for purchases of lands in violation of the constitutional provision to forfeiture, fine and imprisonment. See Goodell v. Jackson, 20 Johns. R. 693, 727 (N.Y. 1823).

All of the early litigation involving the Indian lands provision of the state constitution dealt with lands granted by New York to individual Indian veterans of the Revolution rather than with federally protected tribal lands. See *ibid.*, and Lee v. Glover, 8 Cow. 189 (N.Y. 1828). See also Murray v. Wooden, 17 Wend. 531 (N.Y. 1837), holding state restrictions applicable because federal regulation did not cover "sales of the bounty lands granted to individual Indians by the state."

32. Goodell v. Jackson, 20 Johns. R. 693, 730 (N.Y. 1823).

33. See Chancellor Kent's summary of early state Indian legislation, *ibid,* and the comprehensive "Act relative to Indians," Law of April 4, 1801, 1 N.Y. LAWS (2d ed. Webster & Skinner) 464. Much of today's codified Indian Law of New York has its antecedents in regulations of that period.

34. See Brief for the Warden and the State of New York, pp. 17-18, New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

35. United States v. Forness, 125 F.2d 928, 930-31 (2d Cir. 1942).

long sought the removal of its Indians to the West[36] but believed this to be an area in which federal action was necessary. Some New York Indians moved to Wisconsin under federal supervision in the 1830's. By a Treaty of 1838,[37] almost all of the New York tribes agreed to remove, partly because of a dispute with the Ogden Land Company which claimed an interest in their lands.[38] Several tribes, however, insisted on remaining and the federal government did not wish to expel them forcibly. Accordingly, the Ogden group and the Senecas, under federal supervision, negotiated a compromise which was incorporated in an 1842 treaty between the Senecas and the United States.[39] Under this treaty, the Allegany and Cattaraugus Reservations were assured to the Senecas in exchange for release of other Indian lands.[40] Once again, as it had in the nineteenth century, the United States assumed treaty obligations to protect New York Indian lands.

With the Treaty of 1842, the period of federal inattention and relatively unquestioned state control appears to have ended. To be sure, the Indians continued to look to the state for protection. Elaborate provisions with respect to tribal government were added to the Indian Code[41] and the Seneca Constitution of 1848 was recognized by the state. But the right of the state to protect Indian lands against intruders, asserted in legislation since 1813, was soon challenged under federal law. The United States Supreme Court, in *New York* ex rel. *Cutler v. Dibble*,[42] appeared to calm doubts over the validity of state regulation by holding, on the basis of a vaguely defined police power, that the state could

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36. COHEN 420.

37. Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550.

38. The Ogden claim has been a pervasive source of difficulty in the handling of New York Indian matters. This "peculiar . . . complicated and perplexing" claim, WHIPPLE REPORT 34, is derived from private grantees of the pre-emption rights obtained by Masachusetts in the 1786 compromise with New York, see notes 25 and 29 *supra*, and affects the Allegany, Cattaraugus and Tuscarora Reservations, see N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS REPORT, LEG. DOC. (1944) No. 51, 6-7. The history of the dispute is recounted in detail in the WHIPPLE and REEVES REPORTS.

39. Treaty of May 20, 1842, 7 Stat. 586.

40. One of the areas purportedly released by the Senecas under this agreement was the reservation of the Tonawanda band of Seneca Indians. The Tonawandas claimed that they had not agreed to the 1842 treaty, refused to move from the land, and split off from the Senecas. The federal government ultimately negotiated a separate treaty with the Tonawandas, Treaty of Nov. 5, 1857, 11 Stat. 735, by which the Tonawandas purchased their present reservation. By the 1857 Treaty, title to the land was held in trust by the Secretary of the Interior, "until the legislature of the State of New York shall pass an act designating some persons, or public officer of that State, to take and hold said land upon a similar trust for said Indians." After state legislation in 1860 the federal government transferred title to the State Comptroller in trust. See WHIPPLE REPORT. This unique history was relied upon in finding federal consent to state authorizations of Tonawanda Reservation leases. United States v. National Gypsum Company, 141 F. 2d 859 (2d Cir. 1944).

41. See, *e.g.*, N.Y. INDIAN LAW §§41-43, as revised from N.Y. Laws 1847, ch. 365.

42. 21 How. (62 U.S.) 366 (1858).

apply its laws to remove intruders from Tonawanda lands.[43] Although Congress had enacted laws to protect the Indian's possession of tribal lands as early as 1802, New York's similar legislation was not thereby barred: "The statute in question is a police regulation for the protection of the Indians from the intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion."[44]

Shortly thereafter, however, the Supreme Court curtailed New York's power sharply, in an opinion with dicta as broadly restrictive of state power as the *Dibble* opinion had provided in the opposite direction. *The New York Indians*[45] involved New York's attempt to tax lands from which the Senecas had agreed to remove by the Treaty of 1838. The tax laws were enacted in 1840 and 1841, before the Treaty of 1842 had assured the Senecas retention of certain of the lands. The 1840 law authorized sale of the lands in case of the default in tax payments; the 1841 law had added a proviso that "no sale for the purpose of collecting said taxes shall in any manner affect the right of the Indians to occupy said lands." The New York Court of Appeals had invalidated only the 1840 statute; the Supreme Court voided the 1841 tax as well, despite the proviso. The Court did not agree that the transfer of the lands to non-Indians pursuant to the 1838 Treaty gave New York power to subject the property to taxation while the Indians were still in possession. Nor did the Court give much weight to New York's attempt to protect the Indians' possessory rights through the 1841 proviso: "The rights of the Indians do not depend on this or any other statutes of the State, but upon treaties, which are the supreme law of the land." Emphasizing the repeated federal guarantees to the Indians since the Treaty of 1784, and relying upon a companion case in which it had stated that Indian tribes are "governed exclusively by the government of the Union,"[46] the Court concluded: "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are . . . entitled to the undisturbed enjoyment of them. . . . We must say, regarding these reservations as wholly

43. In an earlier decision relating to New York Indian lands, *Fellows v. Blacksmith*, 19 How. (60 U.S.) 366 (1856), the Court held that the Ogden claimants did not have the right to remove Tonawandas from lands surrendered by the 1842 Treaty. See note 40 *supra*. The Court stated that "the removal of . . . Indians from their ancient possessions" must be by the authority of the federal government and "under its care and superintendence." 19 How. (60 U.S.), at 370-71.

44. 21 How. (62 U.S.), at 370.

45. 5 Wall. (72 U.S.) 761 (1866).

46. The Kansas Indians, 5 Wall. (72 U.S.) 737 (1866).

exempt from State taxation . . . the exercise of this authority over them is an unwarrantable interference. . . ."[47]

Nor were the broad dicta of the *Dibble* case sufficient to uphold New York's authorizations of tribal property leases, particularly in the Salamanca area. Though such authorizations had been attempted by New York since 1835, an unreported New York Supreme Court decision in 1870 held the leases void for lack of federal ratification.[48] The state legislature promptly sought such ratification, in a resolution reciting: "Whereas, The Legislature of the State of New York has, at different times, ratified and confirmed leases between Indian and white settlers on the Alleghany Indian reservation . . .; and Whereas, The courts of this State have decided that said ratification is null and void, the Congress of the United States alone possessing power to deal with and for the Indians. . . ."[49] Congress legalized some of the leases, established certain villages on the reservations of the Senecas, and provided for new leases.[50] By this act and subsequent modifications, leases on these reservations continue to be regulated by the federal government.[51]

New York's growing awareness of its relative impotence with respect to Indian land transactions during the latter part of the nineteenth century culminated in an important New York decision in 1894, *Buffalo, R. & P. R. Co. v. Lavery*.[52] That was a dispute between two non-Indians claiming leasehold interests in certain property in Salamanca. One claimed under a lease from the Senecas allegedly authorized by a New York statute of 1835; the other, under a lease made pursuant to the Congressional legislation of 1875. The court held for the latter claimant, in an opinion which circumscribed state power sharply and clearly:

> ". . . it is not within the legislative power of the State to enable the Indian nation to make, or others to take from the Indians, grants or leases of land within the reservations. In that matter, the Federal Government, having the power to do so, has assumed to control it by the act of Congress of June 30, 1834 [a successor to the earlier Indian

47. 5 Wall. (72 U.S.) at 770-71. The Court noted with gratification, *id.* at 771, that the New York legislature had in 1857 barred any taxation of Allegany and Cattaraugus Reservation lands. A section of the present Indian Law, derived from the 1858 statue, exempts all New York Indian reservations from taxation, "so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." N.Y. INDIAN LAW, §6. See also N.Y. TAX LAW §4(4).

48. See United States v. Forness, 125 F.2d 928, 930-31 (2d Cir. 1942); Brief for the Warden and the State of New York, pp. 26-27, New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

49. N.Y. SESS. LAWS 1875, 98TH SESS., 819. See H. R. MISC. DOC. No. 75, 43D CONG., 2D SESS. (1875).

50. Act of Feb. 19, 1875, 18 Stat. 330.

51. See COHEN 421.

52. 75 Hun. (N.Y.) 396 (1894), *aff'd on opinion below*, 149 N.Y. 576 (1896).

> Intercourse Acts]. . . . As respects their lands, subject only to the pre-emptive title, the Indians are treated as wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquired by conveyance or lease from them. . . ."[53]

Renewed Jurisdictional Doubts, 1889-1942

Though the state's lack of power as to tribal land transactions had become increasingly clear, exclusive federal competence was not universally accepted. A legitimate and commendable concern over conditions on the reservations induced the State Assembly to establish a Special Committee in 1888 "to investigate the 'Indian Problem' of the State."[54] That Committee's recommendations assumed, without explicit consideration of a possible overriding federal authority, that the state could eliminate tribal property holdings. The Committee's study, the Whipple Report, blamed the defects in Indian education, health and morals on the persistance of a large degree of tribal self-government.[55] Indian peacemakers' courts, applying tribal customs, were described as "inefficient and often corrupt."[56] The Report stated the "invariable" answer discovered in its search for a solution of the "Indian problem": "Exterminate the tribe and preserve the individual; make citizens of them and divide their land in severalty."[57]

Whatever the merits of a policy of enforced[58] assimilation of the Indians into the non-Indian community in the late nineteenth century, the methods suggested were of questionable legality. The Committee's recommendations[59] were not limited to the repeal of special Indian legislation and the extension of state jurisdiction over Indian affairs generally. The Report also assumed that the

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53. 75 Hun (N.Y.). at 399-400.

54. See WHIPPLE REPORT. James S. Whipple of Salamanca, N. Y., the chairman of the Social Committee of 1888-1889, was long active in New York Indian affairs. He was also a member of the Committee on Relations to the Indians at the Constitutional Convention of 1915. See 1915 N.Y. CONSTITUTIONAL CONVENTIONAL INDEX 180.

55. State law has recognized tribal self-government for many years. See *e.g.*, N.Y. INDIAN LAW §75 (Senecas; derived from a law of 1847); *id.*, §82 (Tonawandas; first enacted in 1863).

56. WHIPPLE REPORT 74.

57. *Id.* at 68.

Less drastic intra-tribal allotments for possessory purposes, which do not affect underlying tribal rights or "break up" the reservations, have long been known, see WHIPPLE and REEVES REPORTS, and continue to be recognized by state law, see N.Y. INDIAN LAW, §55 (Seneca lands). See also United States v. Boylan, 265 Fed. 165 (2d Cir. 1920); United States v. Charles, 23 F. Supp. 346 (W.D.N.Y. 1938).

58. The committee recognized that there would be Indian opposition but concluded "bluntly" that Indian consent "should no longer be asked." WHIPPLE REPORT 73.

59. *Id.* at 78.

state could alter Indian landholdings absent federal consent by proposing a "radical uprooting of the tribal system" through division of tribal lands.[60]

The Whipple Report did not result in legislative action. A further legislative study, in 1906,[61] proved equally fruitless. But the desire to end Indian separatism persisted and was reflected in a constitutional amendment adopted by the 1915 Constitutional Convention, though subsequently rejected by the voters.[62] The 1915 amendment, however, would merely have abolished Indian courts, transferred their jurisdiction to state courts, and extended state laws to the Indians, except "as otherwise provided by the treaties of this state and the constitution, treaties and laws of the United States." Significantly, the amendment fell far short of accepting the Whipple Report proposals for dividing reservation lands as a means of weakening tribal unity. On the contrary, the Report of the Convention's Committee on Relations to the Indians stated flatly that the amendment was "not intended to affect, nor can it in any way affect, the tribal lands of the Indians," because they could be disposed of only with federal consent.[63]

Even the limited proposal of the 1915 Convention was in some quarters thought to exceed state powers. Thus, the Attorney General of New York ruled in the same year, 1915, that reservation Indians could not be prosecuted in the state courts for violation of the Conservation Law.[64] While the 1915 Convention Committee found lack of state power only where Congress had affirmatively acted,[65] the Attorney General insisted that congressional power of Indians was

60. An unsuccessful proposal to amend the constitution in 1867 had included a similar plan to divide tribal lands. See V DOCUMENTS OF 1867-68 CONSTITUTIONAL CONVENTION, No. 170. Significantly, one member of the Committee on Indian Affairs of the 1867 Constitutional Convention opposed the amendment because "this State has no jurisdiction whatever of the Indians at all. The United States have decided that they have the entire jurisdiction over them. . . ." IV PROCEEDINGS AND DEBATES, 1867-68 CONSTITUTIONAL CONVENTION, 2926. Jurisdictional objections also played a role in the debate on the Convention floor which led to the defeat of the proposed amendment. See V *id.*, 3435-48, esp. at 3443 ("I do not think this scheme is at all consistent with the Federal Constitution. I do not think . . . power resides with the people of this State. . . .")

61. See COMMITTEE ON RELATIONS TO THE INDIANS, REPORT, Doc. No. 26, 1915 N.Y. CONSTITUTIONAL CONVENTION DOCUMENTS, 2-3.

62. See *ibid;* II PROPOSED AMENDMENTS, 1915 N.Y. CONSTITUTIONAL CONVENTION, INT. NO. 707, PR. NOS. 769, 793, 799; II REVISED RECORD, 1915 N.Y. CONSTITUTIONAL CONVENTION, 1233-37, 1570-86.

63. See *op. cit. supra* note 61, at 4, 7.

64. 1915 OPS. N.Y. ATT'Y GEN. (II 1915 REPORT N.Y. ATT'Y GEN.) 492.

65. The Committee relied largely on a narrow reading of *New York ex rel. Cusick v. Daly,* 212 N.Y. 183 (1914), where the Court of Appeals had held that New York lacked power to prosecute Indians for crimes committed on reservations and covered by federal legislation. The court explicitly rejected the argument often made by state officials that federal power over New York Indians is somehow less extensive than over Indians in the West. "There is no vital distinction between our Indians and those of the west." 212 N.Y., at 193. See also Matter of Patterson v. Seneca Nation, 245 N.Y. 433 (1927), where the Court of Appeals took a much narrower view of state power over Indians than is found in some earlier New York cases, *e.g.,* Seneca Nation v. Christie, 126 N.Y. 122, *writ of error dismissed,* 162 U.S. 283 (1896), and Jemison v. Bell Telephone Co., 186 N.Y. 493 (1906).

exclusive: "the principle that a state may act in the absence of affirmative legislation on the part of Congress is not applicable to the Government of Tribal Indians."[66] And, contrary to the Whipple Report's conclusions, the Attorney General stated that only the federal government had power to terminate guardianship over tribal Indians and break up their tribal organizations.[67] A third study published in 1915, by the United States Department of the Interior,[68] took a middle-of-the-road position. It noted that "much needless confusion exists, a pretty general impression prevailing that the State has exclusive jurisdiction;"[69] challenged that claim because of the great growth of federal power over Indians; thought that "jurisdiction seems concurrent rather than exclusive;"[70] urged federal-state cooperation; and finally recommended that "In view of the superior jurisdiction and power over the subject matter," Congress act to curtail tribal self-government and eventually to divide tribal lands among individual Indians.[71]

Such divided views were typical of the prevalent jurisdictional doubts in the years subsequent to the Whipple Report. Debate focused largely on the general extension of a state civil and criminal jurisdiction over Indians rather than any proposals for direct interference with tribal property, but the distinction between general regulation and action affecting Indian lands, stressed by the 1915 Convention Committee, was not usually made. Concern about the "doubt and confusion" about state power was repeatedly expressed,[72] but neither the state nor the federal government took clarifying action and the state continued to provide educational and welfare services for its Indians, in the sum of about $400,000 a year.[73] So the situation remained[74] until a federal decision in 1942 compelled renewed consideration of the status of New York Indians by state and federal authorities—consideration which resulted in federal legislation producing greater clarity than ever before in the history of the state.

66. *Op cit. supra note* 64, at 499.
67. *Id.* at 501.
68. REEVES REPORT 11-25.
69. *Id.* at 14.
70. *Id.* at 15.
71. *Id.* at 21.
72. Mulkins v. Snow, 232 N.Y. 47, 50 (1921). See also Rice v. Maybee, 2 F. Supp. 669, 672 (W.D.N.Y. 1933); Pound, *Nationals without a Nation: The New York State Tribal Indians,* 22 COLUM. L. REV. 97 (1922), and the reflection of the jurisdictional confusion in VI REPORTS OF NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE 201-205 (1938).
73. See the Table of State Expenditures for Indian Welfare, 1911-1947, in "New York Indians," *Hearings before a Subcommittee of the Committee on Interior and Insular Affairs on S. 683, S. 1686, S. 1687,* 80th Cong., 2d Sess., 221 (1948) (hereinafter cited as 1948 HEARINGS). The rate of expenditures exceeded $500,000 annually by 1948. See N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, Feb. 24, 1948, pp. 9-12, 9 N.Y. LEG. DOCS., 171ST SESS. (1948).
74. A 1930 proposal, H. R. 9720, 71st Cong., 2d Sess., that Congress cede civil and criminal jurisdiction over New York Indians to the state was not enacted because of tribal protests. See N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS REPORT, March 15, 1946, p. 5, 16 N.Y. LEG. DOCS., 170TH SESS. (1947).

JURISDICTIONAL CLARIFICATION, 1942-1958

The Forness Decision and Clarifying Federal Legislation.

The 1942 decision in *United States v. Forness*[75] stemmed from an area of New York Indian affairs which had yielded controversy since the 1830's—leases of Indian lands in Salamanca, on the Allegany Reservation. For many years, lessees of Seneca lands had been lax about rent payments. In 1940, during a period of renewed federal interest in New York Indians, the United States brought a test case on behalf of the Senecas to cancel a federally authorized lease for nonpayment of some $44—eleven years' back rent. The Federal District Court refused to grant the requested relief on grounds akin to waiver.[76] In its opinion, however, the Court used broad language restrictive of state power: "The Indians are not subject to state laws and the process of its courts. . . . This proposition has long since and many times been decided by the Supreme Court of the United States and by the court of last resort in the State of New York."[77]

The Court of Appeals for the Second Circuit, in reversing, rejected an argument that cancellation of the leases was barred by the New York Civil Practice Act. The Court found that Congress had not permitted application of the Civil Practice Act, and added that *"state law does not apply to the Indians except so far as the United States has given its consent."*[78] State officials were disturbed and aroused: the decision cast grave doubt on the state's assumption of a vaguely defined concurrent jurisdiction over Indians; if allowed to stand, it would end all hope that New York could extend its civil and criminal jurisdiction over the reservations.[79] When the Supreme Court refused to review the decision,[80] renewed attempts to clarify the Indians' status became necessary.[81]

The Joint Legislative Committee on Indian Affairs, established by the state

75. 125 F.2d 928 (2d Cir.).
76. United States v. Forness, 37 F. Supp. 337 (W.D.N.Y. 1941).
77. 37 F. Supp., at 341.
78. 125 F.2d, at 932, (Emphasis added).
79. See N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. DOC. (1944) No. 51, p. 4.
80. Certiorari denied *sub nom.* City of Salamanca v. United States, 316 U.S. 694 (1942).
81. Two subsequent decisions upholding state action did not allay New York's concern, since they were decided on narrow grounds. *United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944), found federal consent to state action in the particular history of the Tonawanda reservation. See note 40 *supra*. *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946), upheld the state's power to prosecute a non-Indian for the murder of another non-Indian committed in Salamanca on the Allegany Reservation. The Supreme Court carefully restricted its decision to crimes involving only non-Indians, despite the state's energetic effort, supported by an exhaustive brief, to obtain a broader ruling as to New York's regulatory jurisdiction over reservations. See Brief for the Warden and the State of New York in New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

legislature in 1943,[82] noted in its first report the "more or less continuous state of confusion" about New York's authority over reservations. Despite extensive provision of state services and the federal government's "general policy of passive non-interference," the *Forness* decision had undercut the notion that state exercises of power were valid in the absence of federal action. The Committee urged "appropriate action" by Congress to abolish the prevailing uncertainty and warned that the "present system of dual responsibility is fostering disunity and internal strife among the Indians of this State and is further seriously retarding their assumption of the responsibilities and enjoyment of the privileges of citizenship."[83] By 1945, the Committee was able to report[84] that it had prepared draft bills for congressional enactment, one authorizing state jurisdiction over criminal offenses, the other over civil disputes on reservations. The Committee noted that Indian leaders, except the Tonawandas, were opposed to the bills and explained:

> "Opposition is . . . based in part upon a deep-rooted suspicion of the white man not without some justification in the exploitation of Indian property rights during an earlier but unforgotten era. . . . In order to overcome any fear that the proposed legislation is aimed at destruction of the reservations, the Committee incorporated in the draft dealing with civil jurisdiction assurances that such bill, if enacted, could not be construed as subjecting reservation lands to taxation, neither as making dismemberment possible by voluntary or involuntary sale. For the protection of the Indian population it is important that these safeguards be incorporated in any legislation of the character proposed."[85]

The draft bills were submitted to the United States Department of Interior, and the Acting Secretary agreed with the policy of general transfer of jurisdiction to the state courts. He insisted, however, that "any such transfer of jurisdiction must be qualified so as to preserve the capacity of the federal government to take appropriate action for the protection of restricted Indian property and for the discharge of all treaty obligations."[86] Upon the Joint Committee's recommendation, the state legislature in 1945 memorialized Congress to enact the proposed legislation subjecting New York Indians to general state jurisdiction.[87] Consider-

82. Resolution of March 8, 1943, N.Y. CONCURRENT RESOLUTIONS CREATING AND EXTENDING SPECIAL JOINT LEGISLATIVE INVESTIGATING COMMITTEES, LEG. DOC. (1944) No. 52, p. 32.

83. N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. DOC. (1944) No. 51, p. 4.

The general grant of citizenship to Indians, enacted by Congress in 1924 and now found in 8 U.S.C. §1401(a) (2), did not end federal guardianship. See COHEN 97. The main result of the grant, in the eyes of New York Indian leaders, was to assure Indians the right to vote in New York, see 1928 OPS. N.Y. ATT'Y GEN. 204—a rarely exercised right—and to subject Indians to the draft. See generally 1948 HEARINGS.

84. N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. DOC. (1945) No. 51.

85. *Id.* at 4.

86. *Id.* at 8 (Exhibit C).

87. N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, March 15, 1946, 16 N.Y. LEG. DOC., 170TH SESS., 12 (1947).

able negotiations between state and federal officials ensued, during which the Joint Committee continued to reassure those Indians who saw "a sinister purpose on the part of the state to seize their reservations, subject their lands to taxation and destroy the remnants of their tribal existence" by reasserting the "state's sincerity by provisions in the proposed bills expressly forbidding such interpretation."[88] In 1947, the bills were finally introduced in Congress.[89] Extensive hearings were held and the views of state, federal and Indian representatives were fully aired.[90]

Finally, in 1948, Congress enacted a statute authorizing state jurisdiction over all criminal offenses committed on Indian reservations;[91] and in 1950, civil disputes on reservations were similarly made amenable to state law.[92] The text and history of the new legislation are replete with indications that congressional consent is necessary to validate the exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation and that negatives any authorization of "the alienation from any Indian nation, tribe, or band of Indians of any land within any Indian reservation in the State of New York."[93] The Senate Committee's report on that law[94] emphasizes that "State law does not apply to Indians except so far as the United States has given its consent" and points out that the law provides that "no lands within any reservation be alienated." During the congressional hearings, most Indian leaders continued to oppose the bills, partly because of fear of state attempts to deprive them of their reservations, despite the New York Joint Committee's repeated assurances. Accordingly, New York's representatives once more disavowed any intention to break up the reservations and, more clearly than some state officials in the history of the controversy, disclaimed any state power to do so. Moreover, both federal and state officials agreed that the bills would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue.[95]

This clear-cut delineation of state and federal powers gave promise of a new era in which energies might be diverted from jurisdictional disputes to the furtherance of Indian welfare. The state did, indeed, intensify its interest in the

88. *Id.* at 13.
89. S. 1683, S. 1687, 80th Cong., 1st Sess. (1947).
90. See 1948 HEARINGS.
91. 62 Stat. 1224, 25 U.S.C. §232.
92. 64 Stat. 845, 25 U.S.C. §233.
93. 25 U.S.C. §233.
94. S. REP. No. 1836, 81st Cong., 2d Sess. (1950). See also S. REP. No. 1137, 80th Cong., 2d Sess. (1948), reporting on an earlier bill.
95. See 1948 HEARINGS, especially the statements at 2, 9, 60, 79, 184, 210, and 213.

Indians. The Joint Legislative Committee made studies and proposals with respect to changes in state laws and services[96] and the Governor, in 1952, created an Interdepartmental Committee on Indian Services headed by a Director of Indian Services.[97] New York sought to encourage the maximum degree of assimilation of its Indians, "to hasten the time when these people will voluntarily assume a vigorous and active role in our society,"[98] in a program marked by sympathetic consideration of Indian sensibilities and customs.[99] Yet not all representatives of the state limited themselves to efforts so clearly within the newly defined sphere of state authority. On the contrary, in the recent Tuscarora litigation, state officials challenged federal control over the disposition of tribal lands with almost unprecedented vigor and thoroughness. And, surprisingly, the United States District Court accepted many of the broad state contentions. The Court of Appeals for the Second Circuit, however, flatly rejected the sweeping assertions of New York power and reaffirmed the continuance of exclusive federal guardianship over tribal lands. This latest repudiation of a traditional state position, obstinately reiterated in 1958 despite the reasonably clear teachings of history, offers another opportunity to embark upon a new governmental approach to New York Indian affairs—an approach long needed, adopted by some, but not yet accepted by all.

The Tuscarora Litigation, 1958

After a history of controversy almost as turbulent as the falls of the Niagara,[100] Congress, in 1957,[101] directed the Federal Power Commission to issue a license to the Power Authority of the State of New York for the construction of a power project to utilize the greatly enlarged United States share of Niagara River water made available by a 1950 treaty with Canada.[102] The

96. See the recent annual reports of the NEW YORK JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS: LEG. DOC. (1951) No. 66; LEG. DOC. (1952) No. 74; LEG. DOC. (1953) No. 74; LEG. DOC. (1954) No. 42; LEG. DOC. (1955) No. 41.

97. The Committee is composed of the Commissioners of Education, Health, Social Welfare, Mental Hygiene and Conservation, and the Superintendents of Public Works and State Police, or their representatives. See N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. DOC. (1953) No. 74, pp. 3-4.

98. *Id.* at 4.

99. See *id.* at 5. The primary achievement of this program has been the "notable progress" toward eliminating segregated schools by providing education for the state's 1800 Indian children in local schools aided by special state financial aid. N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. DOC. (1955) No. 41, pp. 3-5.

100. The background of the dispute over Niagara River power development is summarized in Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1153-64 (1956).

101. Act of Aug. 21, 1957, P.L. 85-159, 71 Stat. 401, 16 U.S.C. §836.

102. Uses of the Waters of the Niagara River Convention Between the United States of America and Canada, Feb. 27, 1950, 1 U.S. TREATIES AND OTHER INT'L AGREEMENTS 694, T.I.A.S. No. 2130.

Federal Power Commission license was issued in January, 1958,[103] and the Power Authority, long frustrated in its desire to build America's largest hydro-electric project, was understandably anxious to commence construction as speedily as possible. One of the tracts of land deemed necessary to the development by the Power Authority was a portion of the Tuscarora Indian Reservation. In April, 1958, the Power Authority appropriated 1383 acres of tribal lands—about one-fifth of the reservation—by filing a map of the tract and depositing a sum estimated to be the fair market value with the State Comptroller, under a procedure recently authorized by the legislature.[104] At the same time, the Authority withdrew a slower judicial condemnation proceeding to take the Indian lands which had been initiated a few weeks earlier.[105] But the appropriation method proved to be the less expeditious after all—the construction workers and apparatus which quickly appeared at the reservation borders were soon blocked by a federal court action instituted by the Tuscaroras.[106]

The Tuscarora Nation of Indians sought a declaratory judgment that the state[107] had no power to acquire the tribal lands without express federal consent as well as an injunction against the appropriation of the lands. The state's opposing arguments were not limited to narrow contentions—for example, that Congress had in fact consented to the taking or that certain federal restrictions were inapplicable because of the peculiar history of the tract involved[108]—which might have averted a resurrection of the basic federal-state jurisdictional dispute over Indian lands. Nor was New York content to restrict itself to demonstrating state freedom to condemn lands and to put to one side the problem usually involved in

103. See Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885 (2d Cir. 1958), *Cert. denied* (Tuscarora Nations petition), 79 S. Ct. 66 (1958) *appeal docketed*, 27 U.S.L. WEEK 3087 (U.S. Sep. 19, 1958) (No. 386), *sub nom.* Johnson v. Tuscarora Nation of Indians, (hereinafter cited as "Second Circuit Opinion").

104. N.Y. HIGHWAY LAW §30, as made applicable by N.Y. PUB. AUTH. LAW §1007 (as amended by N.Y. LAWS 1958, ch. 646).

105. See Second Circuit Opinion 887-88.

106. The action was instituted in the Southern District of New York on April 19, 1958, and was transferred to the Western District on May 8, 1958, on defendant's motion. A temporary restraining order originally entered to prohibit the defendants from entering upon the land was subsequently extended, after a modification permitting entries to make surveys, maps, examinations, borings and similar tests. See Tuscarora Nation of Indians v. Power Authority, 161 F. Supp. 702 (S.D.N.Y. 1958).

107. The named defendants were the Power Authority, Robert Moses, its Chairman, and John W. Johnson, New York Superintendent of Public Works. Under the 1958 amendment of the Public Authorities Law, the Superintendent of Public Works is charged with the duties of appropriating property in the name of the state "when requested by the authority" and of removing the occupants and obtaining possession "where necessary." See N.Y. PUB. AUTH. LAW §1007(10) and note 104 *supra*.

108. The land sought by the Power Authority had been acquired by the Tuscaroras after 1800 by a purchase from the Holland Land Company, paid for out of the proceeds received from the sale of Indian property in North Carolina. It was therefore possible to argue that the protections of 1784 and 1794 treaties did not extend to such lands. See note 117 *infra*.

earlier litigation, attempted state control of private land dealings with Indians. Rather, a formidable mass of documents submitted to the District Court—a 91-page memorandum,[109] a 175-page appendix,[110] and a 27-page affidavit[111]—reviewed the entire history of Indian lands disputes and sought primarily to establish the inapplicability of federal restrictions to New York Indian lands.[112] Federal Non-Intercourse Acts[113] are inapplicable to purchases of tribal lands in the state; the proviso in the 1950 Civil Jurisdiction Act[114] did not assure federal control of land alienations in New York; federal restrictions concerning "Indian country" generally apply only to reservations west of the Mississippi—sweeping assertions such as these mark this latest revival of New York's claims to a unique state power over Indian lands. And the state's claims prevailed in the District Court, as they had occasionally in the past.[115]

The District Court's opinion dismissing the Tuscaroras' complaint[116] contained statements of a scope to match the state's contentions: "Whatever interest the United States has in the New York Indians is directed not to Indian lands as such, but to something more vague and general, such as their general welfare"; "Indians in New York are wards of the State"; the status of New York Indian lands "is in contrast to that of all lands, and particularly Indian lands, outside the original thirteen colonies"; the Federal Non-Intercourse Act presents "no bar to the exercise of eminent domain"; if, in enacting the 1950 Civil Jurisdiction Act, "Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have

109. Memorandum of Defendants Power Authority of the State of New York and Robert Moses in Opposition to Plaintiff's Application for a Preliminary Injunction and in Support of Defendants' Motion for Summary Judgment, Tuscarora Nation of Indians v. Power Authority, *supra* note 2.

110. Defendants' Appendix, Tuscarora Nation of Indians v. Power Authority, *supra* note 2.

111. Affidavit of Henry S. Manley, Tuscarora Nation of Indians v. Power Authority, Civil Case No. 7844 (W.D.N.Y. 1958). Mr. Manley, who served as a consultant for the Power Authority and participated in the preparation of briefs in this case, has played an important role in the formulation of the state's legal position as to control of Indian affairs. He served in the Attorney General's office for many years, retiring in 1955 after five months service as Solicitor General, participated in much of the litigation on Indian matters in state and federal courts, "drafted numerous opinions for the Attorney General on Indian questions and prepared advice for legislative committees and departments of the State government." *Id.* at 1-2.

112. See also Brief of the Attorney General for the New York Superintendent of Public Works and Brief of Power Authority and Robert Moses, Tuscarora Nation of Indians v. Power Authority (2d Cir. 1958).

113. See text accompanying notes 20-22 *supra.*

114. See text accompanying note 93 *supra.*

115. See, *e.g.*, the recent examples in United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943) (leases and conveyances of St. Regis lands), and United States v. Cattaraugus County, 71 F. Supp. 413 (W.D.N.Y. 1947) (state condemnation of Seneca lands for highway construction).

116. Tuscarora Nation of Indians v. Power Authority, *supra* note 2.

chosen so incongruous and unlikely time and place to do so," or have done so "in so casual and off-handed a manner."[117]

This untenable challenge to federal authority was flatly rejected in every significant respect by the Court of Appeals for the Second Circuit.[118] In an opinion of July 24, 1958, the Court disagreed with the State's assertion that the Non-Intercourse Act and the Civil Jurisdiction law "do not apply to the State of New York which possesses sovereign power of condemnation over Indian lands, independent of and never surrendered to, the Federal Government, derived from its status as one of the thirteen original colonies."[119] To Judge Leonard P. Moore, the decisions over the last 150 years revealed "uniform support for the doctrine that the Indian tribes are wards of the United States and that a general guardianship power is vested in the United States to protect them and their property."[120] And that federal concern continues applicable to New York Indians: "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U.S.C.A. §233 [the Civil Jurisdiction Law of 1950], pointed up and reaffirmed its paramount authority over Indian tribal lands."[121] The Power Authority's appropriation of the lands presented a situation which "would seem to call for the exercise of that guardianship protection which the United States has asserted and exerted over the years";[122] the District Court was wrong in believing that the federal statutes were inapplicable to state takings.[123]

This did not mean, however, that the Power Authority could not in any manner acquire the tribal property. Though a state acting alone is powerless, the United States may take Indian lands by eminent domain[124] and may delegate that right to Federal Power Commission licensees—"Of necessity, however, the exercise of this power must be by the United States through Congress."[125] Here, in view of the "size and extent of the Niagara Power Project" and the legislative history, it was possible to infer Congressional authorization of the taking of the tribal lands "from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the

117. *Id.* at 113, 114, 115, 116. The District Court also found the 1784 and 1794 treaties inapplicable to the lands purchased by the Tuscaroras after 1800: "It is not reasonable to interpret either treaty . . . to apply the guarantees contained therein to after-acquired lands . . . purchased by plaintiff." *Id.* at 111.
118. Second Circuit Opinion.
119. *Id.* at 888.
120. *Id.* at 890.
121. *Id.* at 891.
122. *Id.* at 892.
123. *Id.* at 893.
124. See, *e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
125. Second Circuit Opinion at 893.

Tuscarora Reservation."[126] However, the federal power of eminent domain granted to the state agency must be exercised through one of the judicial proceedings prescribed by the Federal Power Act, not through the short-cut authorized by the state legislature which "enables the Power Authority to move in, appropriate the land and remove the owner before he has had a chance to have a judicial hearing."[127] The fact that "construction workers are on the borders of the Reservation ready to install power lines and cover the land with fill for the reservoir dikes" was no reason to withhold invalidation of improper state action—"aggressive construction activity should not be sufficient to nullify the protective policy of the Government towards the Indians or the laws calculated to enforce that policy. The Congressional concern, exhibited as recently as 1950, . . . is ample evidence that 'guardianship' still exists. If the Indians are no longer to be the wards of the United States such a change should be by Congressional enactment and not by court decision."[128] The court accordingly annulled the Power Authority's appropriation of the Tuscarora lands but held that the lands could be condemned by the procedures under the Federal Power Act.

CONCLUSION—TIME FOR A NEW APPROACH

Oft-repeated, tradition-laden contentions are perhaps the most difficult to dislodge. And the very weakness of a position may strengthen the reluctance to yield and may indeed blind its defenders to the crumbling foundation. So it may be with New York's assertion of a unique power over Indian lands; that may explain the state's broad claims in the *Tuscarora* case, despite all that has gone before. Though federal supremacy emerged prior to 1942, the confused history offered some comforting strands to the state: the *Forness* decision could be brushed aside as a sentimental aberration in a case in which, in any event, the state did not participate; the remoteness of its source and the emphasis on matters other than land transactions might soften the impact of the federal legislation of 1950 on those clinging to notions of state independence from federal restrictions. Yet there is basis for confidence that the most recent jurisdictional delineation will permeate where earlier clarifications failed to eliminate residual illusions. The *Tuscarora* decision of the Court of Appeals came, after all, in a case which the state deliberately chose to make the most elaborate presentation of its position and to argue on the broadest possible grounds. All the greater the significance, then—and all the more penetrating the likely impact—of the repudiation of New York's contentions. The court's insistence that federal guardianship over tribal land holdings persists thus furnishes an appropriate occasion to initiate, albeit belatedly, some needed changes in governmental attitudes, by the nation as well as the state.

126. *Id.* at 893.
127. *Id.* at 894.
128. *Id.* at 894.

State action. Today New York has authority to apply its laws to occurrences on the Indian reservations. But it is for the federal government, not the state, to decide whether or not tribal lands may or must be conveyed to non-Indians. As a first stage in manifesting its acceptance of this sphere of federal control, New York might well consider eliminating the Indian lands provision of its constitution.

In 1777, when the provision was first adopted, the state could properly be regarded as the chief guardian of tribal land ownership. Subsequent events, however, have destroyed all legal basis for this view. The original function of the constitutional requirement of state consent to Indian land sales was to demonstrate amity toward the Indians. Whether it ever served its declared purpose is debatable. Today, in any event, the good will of the state toward its Indian population is actively manifested by the extension of services rather than by controls of land transaction. Indeed, the present significance of the constitutional provision is primarily a symbolic one—a symbol far more likely to arouse Indian distrust and hostility than to further friendship. In the *Tuscarora* case, for example, the District Court invoked the provision in rejecting the Indians' complaint: "The State Constitution . . ., far from presenting a bar to public condemnation, discloses an intent by the state to exercise exclusive control over Indian lands in New York."[129]

The minor respects in which the constitutional restriction may still retain significance are not sufficient to justify its retention. Thus, New York may presumably control the alienation of tribal lands owned by two small Long Island groups, the Shinnecocks and the Poosepatucks, since these are not recognized as Indian tribes by the federal government.[130] Retention of the constitutional provision because of its applicability to 300 acres of reservation lands hardly seems warranted, however: the legislature has already manifested its lively concern for the Long Island Indians,[131] and the protections and services needed by these small communities can be—and are being[132]—provided without the oblique support of Article I, Section 13. The section also theoretically applies to disposition of lands privately owned by individual Indians outside the reservations,[133] another area untouched by federal control. The provision has, however, long ceased to have any practical significance as to such individual holdings. Since the nineteenth

129. Tuscarora Nation of Indians v. Power Authority, *supra* note 2, at 116.

130. The Long Island Indians intermarried with Negroes at least as early as the pre-Civil War period. See WHIPPLE REPORT at 54; 1948 HEARINGS, 217; H. R. REP. No. 2503, 82d Cong., 2d Sess. 531, 593 (1952).

131. See *e.g.*, N.Y. INDIAN LAW art. 9 (Shinnecock tribe); N.Y. LAWS 1955, ch. 838.

132. See, *e.g.*, District Attorney of Suffolk County v. Great Cove Realty Co., 137 N.Y.S.2d 570 (1955); N.Y. JOINT LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS, REPORT, LEG. DOC. (1954) No. 42, p. 4.

133. Indeed, the only early litigation involving the constitutional provisions dealt with such individual Indian land holdings. See note 31 *supra*.

century, the legislature has given its blanket consent to sales of non-reservation lands by Indians—a consent renewed as recently as 1956.[134] The provision, with needless complexity, seemingly confers a special status on such lands, but the legislature has with complete validity terminated that status.

These marginal remnants of arguable vitality are easily outweighed by the clear vices of Article I, Section 13. The section, at the least, blocks attainment of a truly simplified constitution.[135] More importantly, the provision implies a non-existent state power over federally protected tribal lands—an implication which has contributed to the confusion over Indian land controls in the past and which continues to feed Indian fears of state designs on their tribal property and integrity.

Legislative initiative to eliminate the Indian lands provision might well be joined with a thorough reexamination of the state Indian Law, a task already begun by the Joint Legislative Committee on Indian Affairs. Particular attention needs to be given to the elimination of laws reflecting the constitutional assumption of state power over tribal lands.[136] If a substantial need for state authority over tribal land ownership exists in specific areas, as perhaps with respect to acquisition of lands for highway construction, a state request for express congressional consent would no doubt be heeded, as in the 1940's. Such recognition of federal authority, consonant with the present distribution of governmental power, would no doubt avert much litigation. And most importantly, it would assure that the state's admirable efforts to promote Indian welfare would more effectively further their avowed ultimate purpose of expediting voluntary assimilation of New York's Indians, by removing Indian resistance generated by illegitimate state assertions of power over tribal lands.

Federal action. National officials must commence a far more consistent and energetic exercise of their responsibilities if governmental relations with New York Indians are to improve significantly. Federal inattention and ambivalence must bear much of the blame for the confusions and conflicts in federal-state relations which mark the history of New York Indian affairs. The Court of Appeals in the *Tuscarora* case noted that "a large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or

134. N.Y. INDIAN LAW §2 as amended by N.Y. LAWS 1956, ch. 243. See MCKINNEY'S 1956 N.Y. SESS. LAWS 1656 (Governor's memorandum).

135. See N. Y. SPECIAL LEGISLATIVE COMMITTEE ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, REPORT OF THE INTER-LAW SCHOOL COMMITTEE ON THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION, N.Y. LEG. DOC. (1958) No. 57, esp. at pp. 33-42.

136. See, *e.g.*, N.Y. INDIAN LAW §§7 (partition and alienation of tribal lands), 12 (highways on tribal lands), 24 (Onondaga leases), 83 (Tonawanda leases), 90 (erection of poles and wires).

approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians."[137] "Indifference," unfortunately, has been far the most common characteristic of federal action; it was largely responsible for the state's assumption of regulatory jurisdiction recognized by the federal laws of 1948 and 1950 and it undoubtedly contributed to the notions of state independence as to tribal land ownership as well. Though national guardianship of New York tribal lands is clearly manifested by federal treaties and statutes, it has only intermittently been expressed in official practice.

The reaffirmation of the federal concern and the concomitant restriction on state power in the 1950 legislation apparently had as little effect on federal attitudes as on those of some state officials. In 1954, to be sure, the Department of the Interior reported to Congress that termination of federal treaty obligations to New York Indians was not desirable and that restrictions on land transactions should continue.[138] And in a study prepared at that time, the Department noted that discharge of treaty obligations "usually means furnishing legal assistance through the Department of litigation affecting the use or occupancy of these lands."[139] But the recent experience of the Tuscaroras in seeking federal aid to oppose the New York Power Authority's appropriation of their lands illustrates the difficulties of giving content to recognized federal responsibilities. The Interior Department's response to the Tuscarora request substituted questions about the scope of the treaties for a firm delineation of federal responsibilities;[140] and a discussion of alternative methods of contesting the state's claims—in the courts or in a license proceeding before the Federal Power Commission—included the puzzling statement: "As your reservation lands are under state jurisdiction, this Department is not in a position to present your case for you."[141] Nor were the Tuscaroras able to elicit any guardianship interest before the FPC: the Commission, in issuing the license to the New York Power Authority, concluded that the question "whether the licensee is empowered to acquire [Tuscarora] land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction."[142]

137. Second Circuit Opinion at 889.

138. Letter of Orme Lewis, Assistant Secretary of Interior, to the Speaker of the United States House of Representatives, Jan. 4, 1954, Plaintiff's Exhibit No. 7, Tuscarora Nation of Indians v. Power Authority, *supra* note 2.

139. See "Background Data on Indians of New York," p. 4, submitted with Lewis Letter, note 138 *supra*.

140. Letter from Assistant Secretary of the Interior Aandahl to Harry Patterson, Chief of the Tuscarora Indians, dated Nov. 1, 1957, Defendants' Appendix, Tuscarora Nation of Indians v. Authority, *supra* note 2.

141. *Id.* at 171a.

142. Second Circuit Opinion at 889, 890. A petition for review of the FPC order is pending before the United States Court of Appeals for the District of Columbia. *Ibid.* Compare Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), stating that FPC licenses for the construction of reservoirs and power houses "upon any part of the public lands and reservations of the United States" may be issued

(Footnote continued on following page.)

Meaningful exercise of federal guardianship surely requires more than such half-hearted, confused, at best careless, responses by federal agencies. And, as the taking of lands for federally authorized developments becomes an increasingly pressing threat to tribal holdings,[143] Congress, too, must exercise its responsibility with greater care. Reservation lands are not and should not be immune from appropriation for power projects necessary to the national welfare. Any congressional authorization of a taking should, however, be based upon a deliberate and explicit determination that the specific tract on one of the fast diminishing Indian reservations is indeed necessary to the project. Though the courts found such congressional authorizations in the recent takings of Seneca[144] as well as Tuscarora lands in New York, the indications of congressional approval were sporadic and tenuous indeed.[145]

Attachment to tribal lands, adherence to tribal organizations—these may seem anachronistic loyalties in the middle of the twentieth century. Yet the persistence of tribal cohesiveness is not altogether startling; it is at least an

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(Footnote continued from preceding page.)
only after a Commission finding "that the license will not interfere or be inconsistent with the purpose for which such reservation was created."

[On November 14, 1958, the Court of Appeals for the District of Columbia Circuit remanded the case to the FPC for a speedy and specific finding as to "interference" as required by the quoted provisions of the Federal Power Act. Moreover, the Court commented that acquisition of the Tuscarora lands did not appear " a matter of necessity to the construction of the project." N. Y. Times, Nov. 15, 1958, §1, p. 1, col. 2.]

143. The Office of the Federal Indian Agent in New York was abolished in 1949, see N.Y. LEG. DOC. (1954) No. 42, p. 7, but this administrative reorganization presumably merely required a more intensive exercise of federal responsibility by the Bureau of Indian Affairs of the Department of the Interior in Washington. Nor is a diminution in federal administrative responsibility warranted by the congressional statement of policy, H. CONG. RES. 108, 83d Cong., 1st Sess., 67 Stat. B 132 (1953), indicating a desire to free New York Indians, among others, from "Federal supervision and control" at the earliest possible time. If that still represents congressional policy, it has at least not yet been implemented in any way. Indeed, Congress took no action on legislative proposals submitted by the Interior Department in 1954 to further such a policy, although the Department's suggestions would not have terminated federal protections of New York tribal lands in any significant respect. See note 138 *supra*.

144. Thus, to speak only of New York reservations, in addition to the atempted appropriation of Tuscarora lands for the Niagara River Power Project, Seneca lands have recently been taken by the United States for the Allegheny Reservoir Project, a flood control development on the Allegheny River. See United States v. 21,250 Acres of Land, 161 F. Supp. 376 (W.D.N.Y. 1957); Seneca Nation of Indians v. Brucker, Civ. No. 2202-57 (D.D.C., March 24, 1958) (unreported opinion of Judge McGarraghy).

145. *Ibid.* In the *Seneca Nation* case, the District Court rejected the Indians' contention that Congress can authorize the taking of lands protected by treaties only by specific legislation and found that an act appropriating money for the construction of the Project "manifested a clear Congressional intention." Seneca Nation of Indians v. Brucker, Civ. No. 2202-57 (D.D.C., March 24, 1958), p. 3 (unreported opinion). Compare the insistence on "clear Congressional action" to indicate "an intention to abrogate the terms of the treaty" in another recent condemnation case involving Indian lands, United States v. 2005.32 Acres of Land, 160 F. Supp. 193, 196 (D. S. Dak. 1958).

understandable defensive reaction in the light of the history of inroads on Indian possessions. In any event, tribal loyalties are facts which must be recognized if the governmental policy of maximum voluntary assimilation of Indians is to progress. The first and essential step in furthering that policy and respecting those loyalties must be a more pervasive acceptance of the federal-state division of responsibilities. Recognition of federal control of Indian land ownership and more consistent exercise of federal guardianship duties; self-limitation by the state to the legitimate sphere of its activities by keeping hands off tribal lands and furthering affirmative welfare services—minimal efforts in such a program will surely produce large returns in reducing Indian distrust, diminishing the causes of separationist loyalties and promoting more enlightened governmental relations with New York's Indians.