

The Current Battle Over Native American Land Allotment

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The assimilationist policies of the federal government toward Native Americans initiated in the late 19th century, including the allotment of tribal land, “proved disastrous,”[1] resulting in, among other things, the fractionation of Native American lands. In an effort to ameliorate the effects of this policy, Congress passed the Indian Land Consolidation Act (ILCA).[2] ILCA allows the secretary of the interior to acquire fractional interests in land previously allotted to individual Native Americans, consolidate them at the tribal level and hold them in trust for that tribe’s benefit.[3]

ILCA is increasingly coming in to conflict with efforts by states, local governments and utilities, among others (the “state condemnors”), that wish to condemn Native American lands. When initiating an eminent domain proceeding involving allotted lands the state condemnors typically rely on 25 U.S.C. § 357 which, in some circumstances, permits the condemnation of “[l]ands allotted in severalty to Native Americans.” However, federal law does not permit the condemnation by a state of tribal lands held in trust by the United States absent specific congressional approval.[4] Accordingly, those courts considering the issue have universally held that § 357 does not permit condemnation when a tribe has obtained an interest in those lands as they are no longer allotted to “Native Americans.”[5]

As ILCA has been implemented, and tribes have increased their beneficial ownership of interests in fractionated allotments previously held by individual Native Americans, those attempting to condemn Native American lands have challenged this precedent. They now insist that once lands are allotted they are always allotted for purposes of § 357 despite the subsequent change in beneficial ownership.[6] Thus, the argument goes, even if a tribe acquires an interest in an allotment under ILCA, the allotment remains subject to condemnation under § 357 because it had previously been allotted to individual Native Americans. However, such an interpretation of both § 357 and ILCA ignores basic principles of statutory construction and tribal sovereignty and the fundamental purpose behind enactment of ILCA.

25 U.S.C. § 357 provides:



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Lands allotted in severalty to Native Americans may be condemned for any public purpose under the laws of the state or territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Section 357, which Congress passed in 1901 and incorporated into the Indian General Allotment Act,[7] was consistent with the assimilationist policies of the late 19th and early 20th centuries. For purposes of condemnation it placed individual Native American allottees on essentially the same footing as non-Native American landowners, allowing their property interests to be taken under state law, albeit in a federal forum with the United States as a party defendant.[8]

Nothing in § 357 suggests that it was intended to permit a tribal interest in allotted land to be condemned under state law. As the Supreme Court recently stressed, “[t]he task of resolving the dispute over the meaning of [a statutory text] begins where all such inquiries must begin: with the language of the statute itself.”[9] In passing § 357, Congress expressed a clear intent to “distinguish between tribal and allotted lands and did not intend to permit condemnation of tribal or communally owned land.”[10] Section 357 allows condemnation only of “[l]ands allotted in severalty to *Native Americans* ...”[11] It is evident from § 357’s context within the General Allotment Act that in limiting condemnation to the lands of “Native Americans,” Congress was referring to individual Native Americans and not tribes.[12] Moreover, damages from the condemnation can only be “paid to the allottee,” again a reference to an individual Native American as opposed to a tribal entity.[13]

The argument by state condemnors that § 357 can be read to permit the condemnation of land originally allotted to individual Native Americans, regardless of subsequent ownership, ignores the statute’s clear text. Nothing in § 357 suggests that Congress intended for the condemnation proceeding to be predicated on the nature of the ownership at the time of allotment rather than the time of condemnation. The statute does not say “land *originally* allotted in severalty to Native Americans may be condemned.”[14] Moreover, it would render nonsensical the last phrase — that “damages shall be paid to the allottee” — given its clear reference to an individual Indian and not a tribe.

Likewise, such an interpretation disregards well accepted canons of statutory construction. First, to the extent there is any ambiguity in § 357, of which there is none, it must be construed in favor of the individual Native Americans and the tribe[15] and any statute purporting to terminate Native American property rights, as the state condemnors seek to do under their interpretation of § 357, must be interpreted narrowly.[16] Secondly, statutes authorizing the condemnation of private lands, generally,[17] and § 357, specifically,[18] must be strictly construed in favor of the owner.

Equally important, in disregarding the beneficial interests of tribes in allotted land so as to permit condemnation under § 357, one would have to ignore the longstanding principle embedded in our Native American law jurisprudence and preexisting the General Allotment Act itself, that tribal lands may not be sold absent approval of the federal government.[19] It would also render largely meaningless Congress’ subsequent enactment of 25 U.S.C. § 324, providing that no right of way across “any lands belonging to a tribe” shall be made without tribal approval.

The state condemnors also cannot avoid the fact that their interpretation of § 357 ignores well established principals of sovereign immunity. While they attempt to limit the inquiry to the original nature of the land over a century ago, they can’t disregard the fact that the condemnation has an immediate effect on the tribal owner which is a necessary party to any such proceeding.[20] They also cannot overcome the fact that there has been no waiver of the tribe’s sovereign immunity by the tribe or Congress.[21]

Finally, such an interpretation of § 357 eviscerates the purpose of ILCA, itself. ILCA was specifically designed to “allow tribes to consolidate their tribal landholdings, reduce the fractionated interests in Native American lands and *reduce the further transfer of Native American lands out of Native American ownership.*”[22] By consolidating previously unproductive and highly fractionated lands at the tribal level, Congress sought to foster the economic development of tribal communities through the development of industry, recreational facilities and housing.[23] In 2009, the longstanding lawsuit, *Cobell v. Salazar*, provided significant funding for ILCA so that fractionated interests could be purchased for the benefit of those communities. Nothing could be more inconsistent with that purpose than if state condemnors could then take those lands through a condemnation proceeding and use them for purposes that may be at odds with those of the tribe.

The state condemnors argue that not allowing them to condemn tribal land under § 357 will impede their own development of necessary infrastructure. However, nothing could be further from the truth. Currently under § 357 they may have to deal with hundreds or thousands of individual landowners in seeking to condemn fractionated Native American land under ILCA, many of whom may be difficult to locate. With the consolidation of those interests under ILCA, they may now be able to deal principally with the tribal government. Additionally, many projects such as pipelines and transmission lines involve both land owned solely by the tribe and land held both by the tribe and its members. It is reasonable under those circumstances to negotiate the terms of any rights of way on a unified basis and not seek to condemn some parcels and negotiate rights of ways over others. Furthermore, recognizing tribal ownership through ILCA reduces the workload of the departments of Interior and Justice who must currently handle condemnation proceedings on behalf of the many individual owners of fractionated interests under § 357. Finally, and most importantly, it requires the state condemnors to finally respect tribal nations as independent sovereigns instead of condemning property without regard to tribal interests.

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[1] *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

[2] P.L. 97–459, 96 Stat. 2515, codified as amended in 25 U.S.C. §§ 2201, et seq.

[3] 25 U.S.C. § 2212(a)(3).

[4] 25 U.S.C. see also *Idaho v. Coeur d’Alene tribe of Idaho*, 521 U.S. 261, 305 n. 7 (1997); Cohen’s Handbook of Federal Indian Law, § 15.06[5] (5th ed. 2005).

[5] See *United States v. Pend Oreille Public Utility Dist. No. 1*, 28 F.3d 1544, 1551-52 (9th Cir. 1994) (noting that § 357 “does not apply to land held in trust for the tribe”); *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cnty. of Thurston*, 719 F.2d 956, 961 (8th Cir. 1983) (holding that § 357 did not allow utility company to condemn tribe’s interests in allotted trust land that had been deeded to the tribe by individual Indians); *Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty.*, No. 15-cv-501 JAP/CG, 2015 WL 9598913, at *13-14 (D.N.M. Dec. 1, 2015), recon. den., 2016 WL 877951 (D.N.M. Mar. 2, 2016) (utility could not condemn the tribe’s interests in two allotments under § 357); see also *Bear v. United States*, 611 F. Supp. 589, 599 (D. Neb. 1985), *aff’d*, 810 F.2d 153 (8th Cir. 1987) (explaining that “treaty lands ... cannot be condemned under § 357”); Cohen’s, § 16.13[4][d][ii] n. 170.

[6] See *Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land in McKinley Cnty.*, No. 15-cv-501 JAP/CG, Plaintiff’s Motion to Alter or Amend Order [Dkt. No. 107] at 5 (Dec. 29, 2015); *Enable Oklahoma Intrastate Transmission, LLC v. a 25 Foot Wide Easement*, Case No. CIV-15-1250-M, Plaintiff’s Objection and Response to Defendants’ Motion to Dismiss and Memorandum in Support [Dkt. No. 45] at 30 (Mar. 7, 2016).

[7] 24 Stat. 388, as amended, 25 U.S.C. § 331, *et seq.*

[8] *Southern California Edison Co. v. Rice*, 685 F.2d 354, 356-57 (9th Cir. 1982).

[9] *Nebraska v. Parker*, ___ U.S. ___, 2016 WL 1092417, at *6 (Mar. 22, 2016) (quoting *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235 (1989)).

[10] *Yellowfish v. City of Stillwater*, 691 F.2d 926, 929 (10th Cir. 1982); see also *Pub. Serv. Co. of N.M.*, 2015 WL 9598913 at *7 (explaining § 357 illustrates a singular Congressional focus on allotted land owned by individual tribal members).

[11] 25 U.S.C. § 357 (emphasis added).

[12] See, e.g., 25 U.S.C. § 334 (referring to an “Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order”); 25 U.S.C. § 350 (referring to the “land on the reservation on which such Indian belongs”); 25 U.S.C. § 352a (referring to the “heirs” of the Indian); see also 25 U.S.C. § 337 (referring separately to “Indian” and “tribe”).

[13] 25 U.S.C. § 349 (referring to an allottee being competent “of managing his or her affairs”) (emphasis added).

[14] See *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981) (“a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency”). In this regard it is unlike *Carcieri v. Salazar*, 555 U.S. 379, 3883 (2009) in which the Supreme Court interpreted 25 U.S.C. § 479 to apply at the time of enactment because Congress additionally used the word “now”.

[15] *Montana v. Blackfeet tribe of Indians*, 471 U.S. 759, 766 (1985).

[16] *Shoshone Indian tribe v. Seaton*, 248 F.2d 154, 155 (D.C. Cir. 1957).

[17] *Sw. Nat. Gas Co. v. Brewer*, 87 P.2d 954, 956 (Okla. 1938); 3 Sutherland Statutory Construction §

64:6 (7th ed. 2015).

[18] *United States v. City of Tacoma*, 332 F.3d 574, 579 (9th Cir. 2003); *Oneida tribe of Indians v. Village of Hobart*, 542 F. Supp. 2d 908, 930 (E.D. Wis. 2008).

[19] 25 U.S.C. .

[20] Federal Rule of Civil Procedure 71.1.

[21] There may be no Congressional abrogation of a tribe’s sovereign immunity unless it has “unequivocally express[ed] that purpose.” *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2031 (2014).

[22] House Rept. 97-908, at 4 (emphasis added); see also House Rept. 97-908, at 9 (explaining ILCA was an effort to protect Indian lands from rapidly going out of Indian ownership).

[23] House Rept. 97-908, at 5; see also *New York v. Salazar*, No. 6:08–CV–644 (LEK/GJD), 2009 WL 3165591, at *14 (N.D.N.Y Sept. 29, 2009) (explaining the purpose of ILCA is, in part, to consolidate the fractionated interests at the tribal level, and thereby “restore Indian economic life through expanding tribal land bases”).
