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Government, Law and Policy Journal

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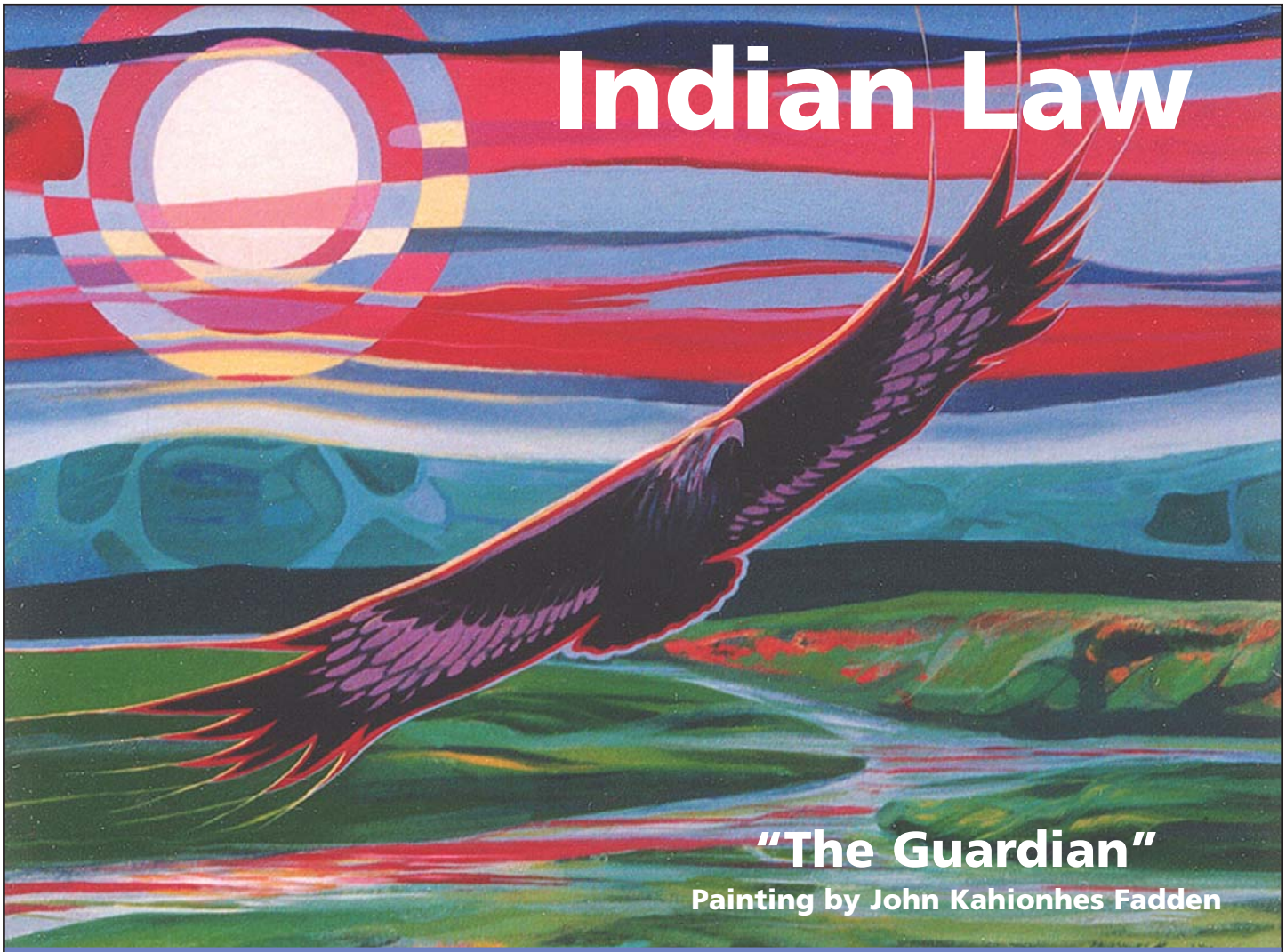

- Iroquois Influence on Democracy
- Indian Treaties and Tribal Sovereignty
- Impact of *City of Sherrill v. Oneida Indian Nation of New York*
- Acquisition of Tribal Land
- Laches at Law and *Cayuga Indian Nation*
- Native Environmental Issues and Resource Issues
- Cultural Preservation

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Sponsored by the New York State Bar Association, Committee on Attorneys in Public Service

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To recognize excellence by a member of the legal profession in the commitment to, and performance of, public service.

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2006	David B. Klingaman (posthumous), NYS Court of Claims and Office of the Staff Judge Advocate, 42nd Infantry Division and Honorable Jonathan Lippman, NYS Unified Court System

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"The Guardian"

The eagle is the guardian bird of the Haudenosaunee,
and is often seen in images as being above the Tree of Peace.

Painting by Mohawk artist John Kahionhes Fadden

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Message from the Chair

By James F. Horan

In January, the Committee on Attorneys in Public Service presented our annual Award for Excellence in Public Service. The Committee presents the Award to recognize excellence by a member or members of the legal profession in the commitment to and performance of public service. This year, the Committee honored three co-recipients:

- Jonathan Lippman, the Chief Administrative Judge of New York State,
- David B. Klingaman, the late Chief Clerk of the New York Court of Claims, and,
- The Office of the Staff Judge Advocate General (JAG) of the Army National Guard for the 42nd Infantry Division.

At the time we announced the Award, the JAG Officers were on station in Tikrit, Iraq, administering a civil justice program as a part of the American occupation in that country. By the night of the Award Reception in January, the 42nd Infantry Division's deployment to Iraq had ended and some members of the JAG Staff were able to attend the Reception to receive their Award.

The January 24th Reception to honor the Award recipients was the most crowded and the most emotional such Reception since the Committee created the Award. Mrs. Alicia Klingaman attended the Reception, with her children and their families, and accepted the Award for her late husband. In introducing the Award for Mr. Klingaman, Chief Judge Richard Sise of the Court of Claims spoke about Mr. Klingaman's long and distinguished service at the Court of Claims. A large number of Judges and staff from the Court of Claims attended the Reception to honor their former colleague. Judge Sise and Associate Judge Susan Read from the Court of Appeals submitted the Klingaman nomination for the Award. In accepting the Award on behalf of the JAG Officers, Lt. Col. Robert Moscati spoke about the sacrifices that the Officers and their families made during the deployment in Iraq and about the work that the JAG Officers did while on deployment. Also, Judge Lippman spoke movingly about public service in accepting his Award. Chief Judge Judith Kaye nominated Judge Lippman for the Award and Judge Kaye introduced Judge Lippman at the Reception.

In choosing the Award recipients each year, the Committee must struggle in selecting who we will honor from a usually large number of highly qualified and dedicated public servants. This year, we made an excellent choice in honoring two men for long and dedicated service in managing the court system and seeing to the day-to-day administration of justice and in honoring a group of men and women, who over a short and very trying time period, away from their homes and families, established and administered civil justice in a dangerous and unstable location.

The Award Reception was one of the highlights of the Bar Meeting this year and was one of the highlights of my three-year term as the Chair of the Committee. That term is ending now and my Vice-Chair, Patty Salkin, will become Chair on June 1st. I'd like to thank Patty for her assistance to me with the general business of the Committee and especially with this *Journal* and with the Committee's excellent educational programs. I'd also like to thank the Committee's members for their assistance, especially my predecessor, Barbara Smith, Sub-Committee Chairs Donna Case, Jim Costello, James McClymonds, Larry Storch, Spencer Fisher and Steve Casscles and the *Journal*'s Editor, Rose Mary Bailly. No one has provided me greater assistance nor has worked harder to make the Committee's work successful than Patricia Wood, the Committee's NYSBA Staff Liaison. Once again, I thank Pat and her Staff for all their work. Finally, I thank the NYSBA Leadership for their continuing support for the Committee and our mission to represent the interests of public service attorneys within NYSBA.

Hon. James F. Horan, Chair of the NYSBA Committee on Attorneys in Public Service, serves as an Administrative Law Judge with the New York State Department of Health. He is a past President of the New York State Administrative Law Judges Association.

Editor's Foreword

By Rose Mary Bailly

Today New York can boast the presence of seven federally recognized Indian nations: the Cayuga Nation, the Oneida Nation, the Onondaga Nation, St. Regis Band of Mohawk Indians, the Seneca Nation, the Tonawanda Band of Senecas, and the Tuscarora Nation. In addition, the Shinnecock Tribe and Poospatuck Unkechauge Nation occupy reservations on Long Island. While recent press coverage of the Indian nations in New York has focused on casinos, there are many issues that confront Indian communities throughout the state. This issue of the *Government, Law and Policy Journal* takes up several of the legal issues that concern Indian nations, including land claims, environmental management, cultural rights and problems of heritage through children. We are fortunate to have many noted scholars on Indian affairs contribute to this Issue.

Our introductory articles provide background for a deeper appreciation of the current state of Indian affairs. "The Iroquois Influence on American Democracy" by Cynthia Feathers and Susan Feathers highlights research about the role of the Iroquois Confederacy in influencing our founding fathers. The Feathers' article reminds us that when the first colonists landed on these shores the Iroquois had been here for many hundreds of years. "American Indian Nations, Indian Treaties, and Tribal Sovereignty" by the Honorable Elizabeth Furse and Professor Robert J. Miller provide us with a thoughtful analysis of the historical and current relationship between the United States and the Indian tribal governments.

Several authors explore the impact of two recent federal court decisions on future Indian land litigation in New York. In *City of Sherrill v. Oneida Indian Nation of New York*, the United States Supreme Court held that recently acquired tribal land was not immune from local government taxes although the taxing authority could not enforce a remedy for the tribe's non-payment. Following on the heels of *City of Sherrill,* the Second Circuit Court of Appeals held in *Cayuga Indian Nation v. Pataki* that a tribal nation could not collect damages for past trespasses on its lands because such claims were barred by equitable defense of laches.

Peter D. Carmen, in his article, "The Impact of the Supreme Court's *City of Sherrill* Decision on Lands Reacquired by Indian Tribes in New York," explains the history of Indian land litigation prior to *City of Sherrill* and describes the possibility of tribes applying to the federal government to place reacquired land in trust to secure its immunity from local government authority. Although early in this country's history the federal government's goal was to break up Indian lands to facilitate the tribes' integration into the non-Indian community, he notes that by 1934 that policy was reversed and the Secretary of the Interior was authorized to acquire lands by a number of means, including trusts, as a way to secure lands for the tribes. Noting that the *City of Sherrill*'s comment on placing land into trust as a way to secure immunity, David M. Schraver's article, "Acquisition of Land by the United States in Trust for Indians and Indian Tribes," details that process, one that New York tribes have recently embraced to counter the result of *City of Sherrill.*

S. John Campanie's article, "Impact of *City of Sherrill v. Oneida Nation of New York*," is critical of the way in which tribes exercised sovereignty over reacquired land in the past and opines that the impact of *City of Sherrill* will be "profound" because it will reverse the trend of upholding Indian land immune from local laws.

In "Laches at Law: The Second Circuit and the *Cayuga* Case," Matthew Leonardo explores the equitable defense of laches and declares that in *Cayuga Indian Nation* the Second Circuit Court of Appeals took an extraordinary step when, based on the *City of Sherrill*, it applied the equitable remedy of laches to bar the Cayugas' claim for rent for Cayuga land occupied by two New York counties. Mr. Leonardo argues that by applying laches the court "ignored the weight of precedent that favored the Cayugas."

Similarly, Arlinda Locklear, in her article, "Tribal Land Claims: Before and After *Cayuga*," argues that in *Cayuga* the Second Circuit misread *City of Sherrill*'s conclusion in dismissing all remedies, even money damages in the Cayuga land claim. She notes that despite *Cayuga*, the tribal nations' desire to rectify disputes about Indian land remains and a way should be found to address them fairly and honorably.

The next series of articles focuses on the use and protection of Indian land from the environmental perspective. Traditional native culture includes great respect for "Mother Earth" and protection of the environment for future generations. Two articles convey a distinctly Haudenosaunee perspective on dealing with environmental issues, and exercising hunting and fishing rights guaranteed by treaty and law. Grant W. Jonathan's article, "Protecting Mother Earth for the Sev-

enth Generation," calls for cooperation between the Iroquois Confederacy, the United States and New York State to address environmental concerns. Christopher A. Amato's article, "Haudenosaunee Hunting and Fishing Rights in New York State," discusses treaty hunting and fishing rights, and calls for New York State to enter into cooperative agreements with the Haudenosaunee that strike a balance between the need for resource conservation and respect for treaty rights. Eleanor Stein's article, "Global Warming: An International Human Rights Violation? Inuit Communities Petition at the Inter-American Commission on Human Rights," explains the efforts of the Inuit people from the Arctic region to seek redress for the impact of global warming on their land, property, culture and way of life.

Our final series of articles focuses on culture and heritage. The tension between a correctional facility's institutional goals and the observation of spiritual rituals is examined in Amy Lavine's article "Free Exercise Claims of Incarcerated Indians: Grooming Regulations and Judicial Standards." In "The Indian Child Welfare Act Implementation in New York," Frederick Magovern analyzes the effect of the federal Indian Child Welfare Act (ICWA) on the decision of an Indian birth parent to place a child for adoption outside the parent's tribe. As Mr. Magovern explains, ICWA was enacted to ensure the protection and continuity of tribal culture by mandating preference be given to tribal placements in proceedings involving separating Indian children from their birth parents. However, jurisdictions across the country disagree as to the extent that concern for continuity of tribal heritage should override an individual birth parent's wishes.

Finally, many readers will be intrigued by efforts to gain casino gambling rights on Indian land described in Bennett Liebman's article, "Off-Reservation Indian Gaming: Will Congress Change the Rules?" The rules for obtaining an exception to the general prohibition on gaming on Indian land are complicated and, in some instances, cause months or years of delay but Mr. Liebman deftly guides us through the maze.

Once again a wonderful collaboration produced this fascinating issue. First and foremost, I want to thank June Egeland, Esq., and Robert Batson, Esq., our special guest editors for this issue. Their expertise on the subject of Indian Law infuses this issue. June Egeland is an enrolled member of the Tuscarora Nation and an attorney. She is currently the Clerk of the Assembly for the New York State Assembly. Her previous work experiences include DNA—People's Legal Services on the Navajo Reservation, where she handled a significant poverty law caseload, and consultant to the Seneca Nation Peacemaker Courts. Bob Batson is an attorney. He teaches Indian Law at Albany Law School and prior to his retirement from New York State Government focused on Indian law.

Our Board of Editors was again instrumental in making very helpful suggestions and providing support. The admirable skills of the Albany Law School student editorial staff, Executive Editor Ryan Emery and his colleagues Joshua Oppenheimer, Andrew Poplinger, Suzanne Post, Jessica Satriano and Sharalyn Savin assisted all of us through the editorial process. The New York State Bar Association staff, Pat Wood, Wendy Pike and Lyn Curtis, deserve special thanks for their wonderful patience and good humor.

Finally, any flaws, mistakes, oversights or shortcomings in these pages are my responsibility. Your comments and suggestions are always welcome at rbail@mail.albanylaw.edu or Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

* * *

Postscript: On May 15, 2006, as this issue of the *Government, Law and Policy Journal* was going to press, the United States Supreme Court denied the petition for certiorari in *Cayuga Indian Nation of New York v. Pataki*, 74 USLW 3452, leaving undisturbed the Second Circuit's decision which is discussed in several articles herein.

The Iroquois Influence on American Democracy

By Cynthia Feathers and Susan Feathers

When our nation drafted its Constitution, the Iroquois Confederacy had been a functioning democracy for centuries, and many historians believe that Iroquoian ideas of unity, federalism, and balance of power were among the influences on the creation of our system of government.[1]

Cynthia Feathers

According to various authorities, the Cayuga, Mohawk, Oneida, Onondaga, and Seneca Nations came together to become the Iroquois Confederacy sometime between 1000 and 1450.[2] In the early 18th century, the Tuscaroras joined the Confederacy.[3] Referred to as the Six Nations by the English, and the Iroquois by the French, the Confederacy called themselves the Haudenosaunee, or "People Building a Long House."[4]

Under the Iroquois Constitution, known as the Great Binding Law or Great Law of Peace, each nation elected delegates, or sachems, who dealt with internal affairs.[5] The Confederacy's Grand Council met to discuss matters of common concern, such as war, peace, and treaty making.[6] The Council could not interfere with the internal affairs of each tribe.[7] Unity for mutual defense was a central concept; "[t]he oral tradition of the Great Law of Peace uses the imagery of a bundle of five arrows tied together to symbolize the complete union of the nations and the unbroken strength that such unity imparts."[8]

The Great Law provided the process for how policies would be thoroughly debated.[9] First the Mohawks and Senecas, or Older Brothers, debated.[10] When they reached consensus, the Oneida and Cayuga, or Younger Brothers, debated.[11] If the Oneida and Cayuga could not reach a consensus with the Mohawk and Seneca decision, then the Onondaga could cast the deciding vote.[12] If the older brothers and younger brothers agreed, the Onondaga would implement the unanimous decision, unless they disagreed with the decision and referred the matter back to the Council.[13] The Council could overrule the Onondaga referral if it again agreed on their decision.[14] The Iroquois decision-making system "with its elder and younger 'houses' and the veto power of the Onondaga [acting as a quasi-executive branch], is strikingly similar to the bicameral legislatures and executive branch later found in the state and federal governments which followed."[15]

For centuries, the Constitution of the Iroquois was unwritten, as the Iroquois tradition of democracy was "transmitted orally from generation to generation through certain lords or sachems of the Confederacy who had made it their business to learn it."[16] In more modern times, several written versions of the Constitution were produced.[17]

Susan Feathers

"[M]any historians believe that Iroquoian ideas of unity, federalism, and balance of power were among the influences on the creation of our system of government."

In the 18th century, "Iroquois territory comprised a large part of what is now New York State."[18] The colonists had long had significant interaction with American Indian societies in diplomacy and trade, and for most of the 18th century, they had relatively friendly relations with the Iroquois.[19] The founding fathers made many treaties with the tribes, were accustomed to dealing with them, and were familiar with their practices and government.[20] To colonists, American Indians were powerful and living "proof that human societies could and did live in liberty."[21] Among our founding fathers, perhaps Benjamin Franklin best dramatizes the influence the Iroquois had on Americans.[22] Franklin, who had a thriving printing business in Philadelphia, started printing small books containing proceedings of Indian treaty councils in 1736.[23] They were some of the first distinctive forms of indigenous American literature and sold quite well, prompting Franklin to continue publishing such accounts until 1762.[24]

A particularly noteworthy treaty proceeding occurred in 1744 in Lancaster, Pennsylvania, when envoys from Maryland, Pennsylvania, and Virginia met with sachems of the Six Nations.[25] The Iroquois leader Canassatego advocated the federal union of the American colonies, exhorting the colonists:

> Our wise forefathers established a union and amity between the Five

> Nations. This has made us formidable. This has given us great weight and authority with our neighboring Nations. We are a powerful Confederacy and by your observing the same methods our wise forefathers have taken you will acquire much strength and power; therefore, whatever befalls you, do not fall out with one another.[26]

An Indian interpreter and old friend of Franklin's brought him the official transcript of the proceedings, and Franklin immediately published the account.[27] Impressed by Canassatego's advice about unity among the colonies, Franklin began a correspondence with Cadwallader Colden, author of an authoritative book on the Iroquois.[28]

In 1751, Franklin wrote a letter to James Parker, his New York City printing partner, on the importance of gaining and preserving the friendship of the Indians.[29] Arguing for a union of the colonies, he mused:

> It would be a very strange Thing, if six Nations of Ignorant Savages should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissoluble; and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous; and who cannot be supposed to want an equal Understanding of their Interests.[30]

Despite the paradoxical use of the phrase "Ignorant Savages," there is support which "shows that Franklin had a healthy respect for the Iroquois."[31] Such language seems intended not so much as an insult to the Six Nations, but rather as "a backhanded slap at the colonists, who may have thought themselves superior to the Indians but who, in Franklin's opinion, could learn something from the Six Nations about political unity."[32] In an essay four decades later expressing unabashed admiration for the Iroquois, Franklin states, "Savages we call them, because their manners differ from ours, which we think the Perfection of Civility; they think the same of theirs."[33]

Franklin carried the Iroquois concept of unity to Albany in 1754, where he presented his plan of union loosely patterned after the Iroquois Confederation.[34] Several Iroquois leaders attended the Congress, convened at an Albany courthouse, to cement an alliance with the Iroquois against the French and to devise a plan for a union of the colonies.[35] An aging Mohawk sachem called Hendrick received a special invitation from the acting governor of New York, James de Lancey, to attend the Congress and to provide information on the structure of the Iroquois government.[36] After Hendrick spoke, de Lancey responded, "I hope that by this present Union, we shall grow up to a great height and be as powerful and famous as you were of old."[37] As the plan for the union was debated, Franklin brought up the strength of the Iroquois Confederacy and "stressed the fact that the individual nations of the confederacy maintained internal sovereignty, managing their own internal affairs without interference from the Grand Council."[38]

When Franklin published his "Short Hints Toward a Scheme for Uniting the Northern Colonies," his Albany Plan proposed that each colony could govern its internal affairs and that a "Grand Council" consisting of a different number of representatives from each colony would provide for mutual defense.[39] This proposed council closely resembled the Grand Council of the Iroquois nations.[40] While the colonies and the Crown were not ready for a colonial union and the Albany Plan was not ratified, Franklin gained recognition as an advocate of colonial union and a place in history as an originator of our federalist system of government.[41]

In 1775, treaty commissioners from the Continental Congress met with the chiefs of the Six Nations and told them:

> Our business with you . . . is . . . to inform you of the advice that was given about thirty years ago, by your wise forefathers, in a great council which was held at Lancaster, in Pennsylvania, when Canassatego spoke to us, the white people, in these very words.[42]

After repeating Canassatego's 1744 speech, the commissioners declared:

> Brothers, our forefathers rejoiced to hear Canassatego speak these words. They sunk deep into our hearts. The advice was good. It was kind. They said to one another: "The Six Nations are a wise people, harken to them, and take their counsel, and teach our children to follow it." Our old men have done so. They have frequently taken a single arrow and said, "Children, see how easily it is broken." Then they have taken and tied twelve arrows together with a strong string or cord and our strongest men could not break them. See, said they, this is what the Six Nations mean. Divided, a single man may destroy you; united, you are a match for the whole world.[43]

While independence was debated by the Continental Congress, the visiting Iroquois chiefs were formally invited into the halls of the Continental Congress.[44] The Articles of Confederation were later approved by Congress in 1777 and by the states in 1781.[45]

In 1787, John Rutledge, a member of the Constitutional Convention and chair of the drafting committee, opened a committee meeting by reading aloud "an English translation of the Iroquois' oral tradition of the founding of the Iroquois Confederacy."[46] He used the structure of the Iroquois Confederacy as support for the proposition that political power comes from "we, the people," an idea later expressed in the preamble to the Constitution.[47]

"Numerous scholars believe that the Albany Plan was a landmark on the road that led to the Continental Congresses, the Articles of Confederation, and the United States Constitution."

Numerous scholars believe that the Albany Plan was a landmark on the road that led to the Continental Congresses, the Articles of Confederation, and the United States Constitution.[48] Starting in the mid-19th century, the "[c]omparison of the Iroquois governmental system with that of the United States beg[un] with Lewis Henry Morgan," a Rochester lawyer, who noted that "'the six nations sustained nearly the same relation to the Iroquois league that the American states bear to the Union.'"[49] In commenting on the Iroquois system of checks and balances, Morgan noted that "'[t]heir whole civil policy was averse to the concentration of power in the hands of any single individual, but [was] inclined to the opposite principle of division among a number of equals.'"[50]

In more recent times, in 1988, the 100th Congress passed a concurrent resolution acknowledging the contribution of the Six Nations of the Iroquois Confederacy to the development of the United States government.[51] After Senate hearings at which numerous scholars testified about the relationship between Iroquois and United States Constitutions, a Senate Report stated:

> More than 200 years ago, the framers of the United States Constitution reviewed the principles of democracy and the democratic institutions of the Six Nations of the Iroquois Confederacy, and then drew from the Iroquois' experiences in constructing the United States' form of government. Senate Concurrent Resolution 76 acknowledges this vital Iroquois contribution to the very foundation of democracy upon which the United States is established.[52]

The House Report elaborates:

> Long before the formation of this Country, the Iroquois Indians had developed a sophisticated political system known as the Six Nations Iroquois Confederacy. As Oren Lyons, Chief of the Onondaga Nation stated: "Upon the continent of North America, prior to the landfall of the first white man, a great league of peace was formed, the inspiration of a prophet called the Peacemaker. He was a spiritual being, fulfilling the mission of organizing warring nations into a confederacy under the Great Law of Peace. The principle [*sic*] of this law are: peace, equity and justice, and the power of good minds." . . . [T]he incorporation of such concepts as freedom of speech, the separation of powers in government and the balance of power within government so impressed Benjamin Franklin that he challenged the colonists to create a similar united government. . . . [P]rincipally through the influence of such men as George Washington and Benjamin Franklin, the existence of such a successful political system among the Iroquois influenced the confederation of the original colonies into one republic and . . . some of the democratic principles espoused by the Iroquois Confederacy found their way into the United States Constitution.[53]

This same spirit of acknowledging the influence of the ancient Iroquois on the new United States was captured poetically by Oren Lyons in an interview with Bill Moyers. Declaring Franklin a visionary who brought Indian ideas of democracy, freedom, and peace to America, Lyons said of the founding fathers:

> In North America at that time, they took an ember, they took a light from our fire, and they carried that over and they lighted their own fire and they made their own nation. They lighted this great fire, and that was a great light at that time of peace.[54]

Endnotes

1. Donald A. Grinde, Jr., *Iroquois Political Theory and the Roots of American Democracy*, *in* Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution 240, 280 (Lyons et al. eds., 1992).
2. Bruce E. Johansen, Forgotten Founders: Benjamin Franklin, the Iroquois and the Rationale for the American Revolution 22 (1982); Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 Am. Indian L. Rev. 133, 142-143 (1993); Arthur C. Parker, The Constitution of the Five Nations n.1 (1916); Jack M. Weatherford, Indian Givers: How the Indians of the Americas Transformed the World 135 (1988).
3. Parker, *supra* note 2, at 7 n.1.
4. Donald A. Grinde, Jr. & Bruce E. Johansen, Exemplar of Liberty: Native America and the Evolution of Democracy 20, 22-24 (1991) (explaining the symbols such as the "long house" used to represent the Confederacy "with the Mohawks guarding the 'eastern door,' the Senecas at the 'western door,' and the Onondagas tending the ceremonial council in the middle.").
5. Thomas A. Berger, A Long and Terrible Shadow: White Values, Native Rights in the Americas Since 1492 58 (1991); Grinde, *supra* note 1, at 227, 240.
6. Grinde, *supra* note 1, at 227, 240; Weatherford, *supra*, note 2, at 136-37.
7. Grinde, *supra* note 1, at 240.
8. *Id.*
9. Grinde, *supra* note 1, at 238; Charles Radlauer, *The League of the Iroquois: From Constitution to Sovereignty*, 13 St. Thomas L. Rev. 341, 345 (2000).
10. Grinde, *supra* note 1, at 238.
11. *Id.*
12. Radlauer, *supra* note 9, at 345.
13. *Id.*
14. *Id.*
15. *Id.*; *see also* Grinde, *supra* note 1, at 239 (stating that the Iroquois political philosophy "reflects the emphasis of the League on *checks* and balances, public debate, and consensus.").
16. Parker, *supra* note 2, at 7.
17. *Id.* at 12-13, *cited in*, Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 Am. Indian L. Rev. 323, 329 n.2 (1988-1989).
18. Berger, *supra* note 5, at 57.
19. *See* Miller, *supra* note 2, at 134 (finding that although the stereotype that "white culture cannot learn anything from the Indians" is not consistent with "the actions of several of the Framers of the Constitution, who learned much from Indian tribes."); *see also* Robert W. Venables, *American Indian Influences on the America of the Founding Fathers*, *in* Exiled, *supra* note 2, at 77 (stating "the English colonial experience had been cooperation with the Iroquois.").
20. Grinde, *supra* note 1, at 240; Miller, *supra* note 2, at 144.
21. Venables, *supra* note 19, at 77.
22. *See generally* Johansen, *supra* note 2, at ch. 4 (describing Benjamin Franklin's relationship and viewpoints concerning the Iroquois culture).
23. *Id.* at 57.
24. *Id.*
25. *Id.* at 58-62.
26. *Id.* at 61-62, *citing*, Indian Treaties Printed by Benjamin Franklin (Carl Van Doren & Julian P. Boyd eds., Pennsylvania Historical Society 1938).
27. Johansen, *supra* note 2, at 62.
28. *Id.*
29. *Id.* at 64-65.
30. *Id.* at 66.
31. Grinde, *supra* note 1, at 242.
32. Johansen, *supra* note 2, at 65-66.
33. Benjamin Franklin, *Remarks Concerning the Savages of North-America*, *in* Franklin: The Autobiography and Other Writings on Politics, Economics, and Virtue 330 (Alan Houston ed., 2004).
34. Johansen, *supra* note 2, at 70-71.
35. *Id.* at 68-69.
36. *Id.*
37. Grinde, *supra* note 1, at 244.
38. Johansen, *supra* note 2, at 71.
39. *Id.* at 70-73.
40. *Id.*; Grinde, *supra* note 1, at 245.
41. Johansen, *supra* note 2, at 73.
42. *Id.* at 75.
43. *Id.* at 76.
44. Grinde, *supra* note 1, at 255, 257.
45. *Id.* at 256.
46. Venables, *supra* note 19, at 77.
47. *Id.*
48. Henry Steele Commager, Documents of American History 111 (1988); Grinde, *supra* note 1, at 256; Miller, *supra*, note 2, at 147; Clinton Rossiter, *The Political Theory of Benjamin Franklin*, *in* Benjamin Franklin: A Profile 179-80 (Esmond Wright ed., 1970).
49. Radlauer, *supra* note 9, at 351.
50. *Id.* at 352.
51. S. Rep. No. 100-565, at 1 (1988).
52. *Id.* at 3.
53. H.R. Rep. No. 100-1031, at 2 (1988).
54. Oren Lyons, *The Faithkeeper, Interview with Bill Moyers* (Public Affairs Television, July 3, 1991), transcript *available at* <http://www.ratical.org/many_worlds/6Nations/OL070391.html>. In 1992, at the 102 Congress, Senator Inouye recognized the important contributions that Lyons had made to the understanding that the fundamental structure of our democratic form of government has its origins in the Iroquois Confederacy. 138 Cong. Rec. S. 15422-01 (1992).

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American Indian Nations, Indian Treaties, and Tribal Sovereignty

By Hon. Elizabeth Furse and Robert J. Miller

Robert J. Miller

Imagine if the State of New York had to constantly justify its sovereign existence and governmental authority to the State of New Jersey or Connecticut, for example. How much governing would it get done if other jurisdictions questioned its every exercise of sovereignty and litigated many of its decisions? That is almost exactly the case that is faced by most of the more than 570 federally recognized Indian Nations that exist today within the United States. Most lawyers are not aware of or trained in the complex area of federal Indian law; consequently, a lot of time is spent by tribal governments protecting their sovereignty against legal attacks on their every exercise of governmental authority; time that they would rather spend providing for their citizens.

The educational system of the United States, from high school through law school, has ignored the governmental status of the Indian Nations. It is no wonder that American citizens and lawyers are confused by, and sometimes hostile to, the unique constitutional status of Indian people and their governments.

Education about Indians shifts from "savages who need to learn the white man's civilization" to a vague sense of "we did them wrong but it's too late to fix that now." Little is done to explain the legal relationship between tribal governments and their citizens and the United States, and the nearly absolute or plenary power that Congress holds over tribes and American Indians. We welcome the opportunity to contribute to this education.

United States Constitution

Understanding federal Indian law and the status of Indian Nations today requires knowledge of a mixture of history and law. In 1787, the new United States government began its relationship with Indians by enshrining their political status in the Constitution. It is obvious that the Founding Fathers recognized the sovereignty, governmental existence, and political actions of the Indian Nations. In Article I, the Constitution states that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] Thus, the political, governmental status of the Indian Nations was expressly recognized in the Constitution. The tribes' inclusion in this list of governments indicates, under the statutory construction principle of *ejusdem generis*, that the Founding Fathers believed that Tribes were sovereign political entities similar to the other listed governments.[2]

Hon. Elizabeth Furse

"The educational system of the United States . . . has ignored the governmental status of the Indian Nations. It is no wonder that American citizens and lawyers are confused by, and sometimes hostile to, the unique constitutional status of Indian people and their governments."

The very first Congress formed under our new Constitution, in 1789-1791, immediately assumed this power over Indian affairs and in the first five weeks of its existence, it enacted four statutes concerning Indian issues.[3] On July 22, 1790, the first Congress also passed a law which prohibited states and individuals from buying Indian lands.[4] That law is still in effect today.[5]

The Constitution also recognized by implication that Indian Nations were governmental entities with which the United States could enter diplomatic treaty relationships. In Article VI, the Constitution provided that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."[6] Notice that this provision had a past and a future effect. Any treaty that would be made in the future would become the supreme law of the land as well as any treaty that the various forms of the U.S. government had *already made*. By 1789, the United States had entered about twenty-two treaties with various foreign countries and it had already entered nine treaties with Indian Nations. This constitutional provi-

sion ratified these past federal treaties with both foreign nations and the Indian Nations as binding law. Ultimately, the United States negotiated and ratified more than 390 treaties with American Indian Tribes. Almost every provision of all of these treaties is still valid today. The United States did not give Indian Nations anything for free in these treaties. Instead, the treaties were formal government-to-government negotiations for peaceful alliances, and for sales of land and property rights that the United States wanted to acquire. The U.S. Constitution states that these federal treaties with Indian Nations are the supreme law of the United States and this provision recognized tribes as political, governmental entities which could enter treaties with the U.S.

By engaging in a treaty-based political relationship with the Indian Nations, the federal government just continued the two-hundred-year practice of every European government that settled in North America. English kings and colonies signed more than one hundred treaties with various tribal governments. The French, Spanish, Dutch, and Swedish, for example, all engaged in treaty relations with Indian Nations to guarantee peaceful conditions and to control trade and land sales.[7]

In addition, the Founding Fathers also realized that Indian people were not U.S. or state citizens. They were citizens of their own political entities: their tribal governments. In Article I, when the Founding Fathers determined how to count the population of a state to determine the number of members of Congress each state would have, the Constitution "exclud[ed] Indians not taxed."[8] Thus, unless individual Indians had purposely joined in the society and life of the state by voluntarily paying taxes to that government, they were not counted as part of the state's population.

In 1868, when the Fourteenth Amendment to the Constitution amended Article I and granted citizenship rights to the ex-slaves and counted them in state populations, Indians were still not granted the rights of American citizenship nor were they counted as state citizens. Again, Indians did not count toward a state's population because the Amendment "exclud[ed] Indians not taxed."[9] This demonstrates that Congress still considered Indians to be citizens of other sovereign governments even in 1868. This view was correct because most Indians did not become United States citizens until 1924 when Congress made all Indians United States citizens.[10] For many years after 1924, states were still uncertain whether Indians had also become state citizens because many states did not allow Indians to vote in state elections until the mid-1900s.[11]

Consequently, the status of the Indian Nations as political, governmental entities and Indian people as citizens of their own governments was enshrined in our Constitution.

Sovereignty

What is sovereignty? Do Indian Nations have sovereign powers today? *Black's Law Dictionary* defines sovereignty as: "The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation," and *Webster's* defines it as: "supreme power, esp. over a body politic; freedom from external control." The simple definition we use is that sovereignty is the regulatory control and civil and criminal jurisdiction exercised by a political entity over people and events that enter or occur within a government's territory. There is no question that Indian Nations possess this kind of sovereignty to a great extent. The jurisdictional questions courts are faced with today is how far can Indian Nations stretch their power and over what groups of people.

Some Basic Indian Law Principles

The Europeans that came to this continent operated under an international legal principle called the Doctrine of Discovery. Discovery immediately began to limit tribal sovereignty and Indian property rights without the knowledge or the consent of Indian people. Under this principle, which was primarily developed by Spain, Portugal, England, and the Church, the European country that first discovered a new area where Christian Europeans had not yet arrived could claim rights in the territory. This did not mean that the Native peoples lost the right to live on their land or to farm and hunt on it, but it did mean that Natives could only sell their lands to the European country that "discovered" them and that they should only deal politically and commercially with that European country. In many situations, the Europeans also enforced the Doctrine against themselves because they recognized and agreed to be bound by the principle that the discovering country earned a protectible property right in newly discovered territories.[12]

In exercising its sovereignty on the American continent, the United States also enforced the Doctrine of Discovery to increase its power over the Indian Nations. Every American government, from the earliest colonial governments to the state and federal governments, utilized Discovery against Indians.[13] The United States Supreme Court was the last branch of any of the colonial, state, or federal governments to expressly adopt Discovery in *Johnson v. M'Intosh* in 1823.[14] This limitation on tribal property, commercial, political, and sovereign rights rebounded to the injury of Indian people then, and, the Doctrine of Discovery is still federal law today. In addition to the Discovery power, the provision in Article I of the Constitution, which granted Congress the sole power to control commercial affairs

between the U.S. and Indian Nations, has strangely been broadly interpreted over the years by the Supreme Court to grant Congress plenary power over tribes.[15]

European nations used the exclusive powers they had gained through Discovery to enter into political relationships and treaties with Indian tribes. These treaties benefited Europeans for a number of important reasons:

1. They desired to obtain legally recognized title to lands;
2. They wanted to prevent Indians from siding with an enemy;
3. They wanted to exclude other nations and their citizens from entering into contracts with tribes to their detriment.

The United States adopted treaty-making for the exact same reasons. When the new U.S. began operating, it was very weak and very short of money. The Revolutionary War had left it vulnerable to the Indian Nations, many of which were still strong. American treaty-making and conciliatory efforts toward the tribes were priorities to preserve the peace and to obtain Indian lands as American expansion needed it.[16]

In exchange for land cessions to the United States, Indian tribes received federal guarantees to large pieces of land the tribes reserved for themselves and jurisdiction over their designated lands, people, and assets. In addition, in many treaties certain rights such as hunting and fishing, and gathering roots and berries were reserved. The treaties of the Pacific Northwest in the 1850s, for example, reserved these rights at "usual and accustomed sites," which means that those rights were off-reservation rights, preserved for the tribal citizens forever, and not governed by state law. Only the citizens of the signatory tribes may exercise these treaty rights because they were specifically reserved in negotiations with the U.S. by their tribal governments for their citizens.[17]

Considerable litigation has occurred over Indian rights and the desire of states to encroach upon these rights. Generally, the states resent the implications of tribal jurisdiction which is outside their control yet occurs within their borders. They often allege that this violates their constitutional rights and their sovereign rights as states. This demonstrates the lack of relevant information about tribes and their governmental and national status within the American federal system of government.

The extent of tribal rights is affected by: (1) Treaties; (2) Acts of Congress; and (3) Litigation. The seminal cases regarding tribal powers and status were decided in the mid-1800s and are known as the Marshall trilogy. These three cases established fundamental principles of American Indian law that are still binding today.

The first case of the trilogy, *Johnson v. M'Intosh*,[18] in 1823, was already mentioned. It adopted the Doctrine of Discovery and imposed limitations on the property, diplomatic, and commercial rights and powers of the Indian Nations. The rationale for the case and for the Doctrine of Discovery comes from ethnocentric, religious, and racial precepts.

In 1831 and 1832, attempts by Georgia to control the Cherokee Nation's sovereign powers led to the Supreme Court cases of *Cherokee Nation v. Georgia*[19] and *Worcester v. Georgia*.[20] The Court laid down several principles in these cases that endure to this day. The Indian Nations are "domestic dependent nations" and "distinct political communities, having territorial boundaries within which their authority is exclusive . . . [and] distinct, independent political communities, retaining their original natural rights. . . . The Cherokee nation, then, is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force."[21] It is important to note that Chief Justice Marshall did not say that tribes lacked sovereignty but rather that they had relinquished certain sovereign attributes to the United States through treaties. For example, almost every Indian treaty has a provision in which the tribe places itself and its commercial activities under the protection of the U.S. It is very important to remember, though, that any rights a tribe did not relinquish in its treaty are reserved to the tribe and its citizens, much like the reservations of rights in the Ninth and Tenth Amendments of the U.S. Constitution, and these tribal reserved rights are protected and enforceable under United States law. Hence, just like the rights that states claim survived their ratification of the Constitution, so has the Supreme Court held that Indian Nations retain and possess all their former sovereign powers except those they have given up in a treaty or which Congress has taken from them in the exercise of its plenary power under Article I, or which a court has determined are "inconsistent with their status" as diminished sovereigns.[22]

The Supreme Court statement that the laws of the State of Georgia could have no force in Cherokee territory was modified a bit in a 1973 Supreme Court case,[23] but it is still the law in most circumstances. Thus, Indian Nations are the primary government with regulatory control and jurisdiction over most events and persons found within a tribe's territory.[24]

Treaty Interpretation

Treaty rights are often hotly contested issues because they are sometimes perceived as "special rights" for Indians. These rights have been vigorously opposed by state officials and issues about tribal

treaties are often in the news. The property rights that a specific treaty protects, however, are not for all Indians, but are rights specific to the tribe that signed the treaty in question and its citizens.

Many people misunderstand the nature of Indian treaties and the reservations that were formed and the promises that were given. Native governments and peoples were not given rights or land by the United States but instead, through political and contract-like negotiations, tribes traded some of their property rights and assets to the United States in exchange for payments, promises, and protection. The treaties were not gifts, but were financial transactions regarding certain rights that tribes sold, and a reservation of other rights Indian Nations already possessed and wanted to retain. It is clear why we call Indian retained lands "reservations." The U.S. Supreme Court expressly recognized this point in *United States v. Winans*, in 1905, when the Court declared that Indian treaties are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[25] Thus, the treaties were contracts in which tribal governments sold some of their property rights to the United States while the tribes held onto or reserved other lands and property rights. It is clear, then, why the Supreme Court has called Indian treaties "a contract between two sovereign nations."[26]

The U.S. dealt with tribes in this manner because Indian Nations were viewed as political entities—and were also very powerful in the 1700s and early 1800s—and were a serious threat to the new United States. Hence, the U.S. was heavily involved in negotiating and dealing with tribes in its early decades. After the War of 1812, however, and the relaxing of the European threat against the United States, the weakening position of tribes led to more one-sided treaty negotiations in favor of the United States.

As mentioned, Indian treaties are very similar to contracts and the Supreme Court deals with them as such. As in contract law, courts try to interpret Indian treaties to achieve the intent of the parties, the "meeting of the minds." The unique aspect of interpreting Indian treaties, however, arises from the recognition of the disadvantaged bargaining position that Indians often occupied during negotiations. Hence, courts narrowly interpret treaty provisions that might injure tribal interests. This analysis is similar to the judicial treatment of "adhesion contracts," which are contracts that were not fairly bargained for and/or in which one party was operating from a much weaker position.

In interpreting Indian treaties, the Supreme Court has developed canons of construction or tools of interpretation that take into consideration the suspect manner in which many Indian treaties were negotiated. Indian treaties receive a broad construction or reading in favor of the signatory tribe by mixing principles of international treaty construction with contract principles. For example, courts resolve ambiguous expressions in favor of the tribe, since the United States drafted the treaties and they were negotiated and written in English, which very few Indians spoke and none could read. Courts interpret treaties as the tribes themselves would have understood the terms used in the treaty and during the negotiations to determine the intent of the parties. Courts also factor in the history and circumstances behind a treaty and its negotiations in interpreting express provisions, and construe them liberally in favor of the Indians. The Supreme Court has stated that the language used in treaties should never be interpreted to a tribe's prejudice.[27]

For many decades, the U.S. Supreme Court had been the bastion of treaty support and had consistently upheld the rights of tribes. Unfortunately for the Indian Nations, in the last twenty plus years there has been a rapid erosion of tribal jurisdictional rights, rights which were seemingly recognized by treaties. Starting with *Oliphant v. Suquamish Indian Tribe* (1978)[28] to *Montana v. United States* (1981),[29] the Court has moved from the principle of there being no state jurisdiction on reservations, as stated in *Worcester v. Georgia*, to the 2001 statement that "an Indian reservation is considered part of the territory of the State."[30]

Conclusion

Throughout their histories, the indigenous people of North America governed themselves and their commercial and political affairs by organizing governments and political entities. When Europeans started settling this continent, hundreds of distinct Indian groups across the continent were controlled and ruled by a variety of governmental forms from loosely governed small bands to sophisticated, semi-autocratic rulers of large groups of people. The European and American governments recognized that Indian Nations were political entities exercising sovereign governmental powers and that almost all tribes had recognized ruling bodies. Thus, Europeans and Americans dealt with these tribal governments for centuries through political diplomatic methods. The Indian Nations are still governments today and the United States still deals with them on a government-to-government basis. Indian Nations still exercise sovereign powers over people and events within their territory. The sovereign authority of the Indian Nations and the principles of federal Indian law, including treaty rights, are major parts of American life today. Indian tribes operate fully functioning governments, court systems, and economic activities. Lawyers and Americans need to educate themselves about this third form of government that makes up part of our American federalism: the United States, the States, and the Indian Nations.

Endnotes

1. U.S. Const. art. I, § 8, cl. 1, 3.
2. Black's Law Dictionary 556 (8th ed. 2004).
3. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 50-53 (2006).
4. Act of July 22, 1790, ch. 33, 1 Stat. 137.
5. 25 U.S.C. § 177.
6. U.S. Const. art. VI, cl. 2.
7. 1 *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979* 13-14 (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1999); Miller, *supra* note 3, at 19-20.
8. U.S. Const. art. I, § 2, cl. 3.
9. U.S. Const. amend. XIV, § 2.
10. Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b)).
11. *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948); *Montoya v. Bolack*, 372 P.2d 387, 390-91, 394 (N.M. 1962); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 372 (1st Cir. 1975).
12. Miller, *supra* note 3, at 4-21.
13. *See generally id.* at 21-76.
14. 21 U.S. (8 Wheat.) 543 (1823).
15. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 381-83 (1886).
16. Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 Am. Indian L. Rev. 133, 151-58 (1993).
17. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 Am. Indian L. Rev. 165, 189-99 (2001); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 Or. L. Rev. 543, 552-63 (1991).
18. 21 U.S. (8 Wheat.) 543 (1823).
19. 30 U.S. (5 Pet.) 1 (1831).
20. 31 U.S. (6 Pet.) 515, 537-38 (1832).
21. *Cherokee Nation*, 30 U.S. at 17; *Worcester*, 31 U.S. at 557, 559, 561.
22. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896).
23. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973).
24. *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 15-16 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *McClanahan*, 411 U.S. at 170-71 (1973).
25. 198 U.S. 371, 381 (1905).
26. *Washington v. Washington Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).
27. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).
28. 435 U.S. 191 (1978).
29. 450 U.S. 544 (1981).
30. *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001).

Hon. Elizabeth Furse founded and directs the Institute for Tribal Government, Hatfield School of Government, Portland State University, where she is also a faculty member of PSU. Furse founded the ITG in 2000 after retiring from the United States House of Representatives (OR 1) (1993-99). Prior to Congress Furse directed the restoration project of Native American Program, Oregon Legal Services; this work led to passage of three Acts of Congress to restore the terminated tribes of Oregon. Furse co-founded Citizens for Indian Rights and the National Coalition to Support Indian Treaties (NCSIT) in 1970.

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The Impact of the Supreme Court's *City of Sherrill* Decision on Lands Reacquired by Indian Tribes in New York

By Peter D. Carmen

In *City of Sherrill v. Oneida Nation*,[1] the U.S. Supreme Court removed the federal bar to state and local taxation of land recently reacquired by Indian tribes in New York but left in place the federal bar to enforcement of those taxes and highlighted the federal "trust land" process as a way of restoring federal tax immunity to reacquired lands.

City of Sherrill involved land conveyed from the Oneida Nation roughly 200 years ago in violation of federal law making such conveyances of no validity in law or equity. The Supreme Court assumed that the land remained a federal Indian reservation to which the Oneidas continued to hold the same unextinguished Indian title (a federally protected right of possession distinct from fee title) that they held before conveyance of the land. The Supreme Court nevertheless held that a mixture of certain equitable principles barred the federal courts from enforcing the tax immunity or otherwise protecting the exercise of tribal sovereignty that ordinarily applies when an Indian tribe is in possession of its federal reservation land to which it retains its Indian title.[2] Of significance for the future in New York, however, the Court also observed that reacquired lands could be protected from state and local taxation and regulation if the Secretary of the Interior were to agree to hold them "in trust" pursuant to 25 U.S.C. § 465.[3] Of further significance, the Court did nothing to alter its previous holding in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*,[4] that, even when states may tax Indian tribes, still they may not take coercive action against tribes to enforce the tax.

Thus, state, local and tribal governments in New York will move away from pre-*City of Sherrill* disputes about municipal authorities' right to tax and regulate lands reacquired by Indian tribes and toward new post-*City of Sherrill* disputes about trust land applications and, until that land is taken into trust, about enforcement of the tax and regulatory power.

How Did We Get to This Point?

During the Revolutionary War, the Oneidas fought as allies of the colonists, even though the other Indian tribes in New York sided with the British.[5] Playing a key role in decisive battles at Fort Stanwix, Oriskany, Saratoga, and elsewhere, the Oneidas contributed to the successful outcome of the war.[6] The Oneidas' homes and crops were destroyed by the British and their Indian allies, which left the Oneidas living as refugees near Albany and elsewhere, sick with disease and starvation. At least a third of the Oneida people died fighting for the colonists, or indirectly because of it.[7]

At the war's end, the Continental Congress confirmed the Oneidas' possession of their lands.[8] A year later, in the Treaty of Ft. Stanwix, the United States similarly promised that the Oneidas "shall be secured in the possession of the[ir] lands."[9] The United States repeated this same promise five years later in the Treaty of Ft. Harmar.[10] Then, in 1790, Congress enacted the Nonintercourse Act, which codified common law rules protecting tribal land and is now found at 25 U.S.C. § 177; the Act always has declared conveyances of tribal land to be of no validity in law or equity unless approved by a federal statute or treaty.[11] When the Act was passed in 1790, the Oneidas held a reservation of some 300,000 acres of land that had always been a part of their aboriginal lands and to which they retained their aboriginal, or Indian title—a tribal right to possess land that is separate from fee title.[12] Just four years later, in the Treaty of Canandaigua, the United States acknowledged that reservation and promised the Oneidas its free use and enjoyment.[13] The terms of this last treaty require the United States to deliver cloth to the Oneidas each year; something that the United States has always done and continues to do pursuant to its obligations under the treaty, signifying the treaty's continuing vitality.[14]

Notwithstanding these treaties and the Nonintercourse Act in 1795, for about fifty years thereafter, the State of New York procured the alienation of Oneida reservation lands to non-Indians, mostly to the State itself. Of all the transactions in Oneida land, only two were approved by a federal treaty, as required by the Nonintercourse Act and federal common law.[15]

As a result of these illegal conveyances, the Oneidas were reduced to possession of a very few acres of their reservation land. When a state court mortgage foreclosure led to the Oneidas' eviction from most of that small amount of land remaining in Oneida possession, the United States went to federal court to keep that land in Oneida hands, and won.[16] The federal court held that

the Oneidas remained in existence as an Indian tribe and that federal law prevented the conveyance of tribal lands. As a result, the federal court restored the Oneidas to possession of the lands from which they had been evicted.[17]

Run-up to *City of Sherrill* Litigation

In 1974, the Supreme Court reversed lower courts and decided that Indian tribes like the Oneidas could assert a federal trespass claim in federal court based on their continuing right to possess the land that had been illegally alienated a long time ago.[18] Further, in 1985, the Supreme Court affirmed a money damages judgment entered against two local counties for unlawful trespass in 1968 and 1969 on certain of the lands the Oneidas had illegally lost in 1795.[19]

The 1985 case concerned only a small part of the Oneidas' illegally lost land; and one would have expected after the 1985 decision that the State of New York and the affected county governments would try hard to settle the entire Oneida claim. Unfortunately, that did not happen.

Beginning in the early 1990s, with no land claim settlement in sight, the Oneidas started a land purchase program, using voluntary market transactions to reacquire from willing sellers possession of lands previously lost illegally. Local municipalities, such as the City of Sherrill, New York, imposed property taxes on the Oneidas' reacquired properties and began foreclosure proceedings when the Oneidas invoked their sovereignty and declined to pay those taxes—although the Oneidas offered and made large grants to affected municipalities and school districts.[20]

City of Sherrill Litigation

The Oneidas sued to stop the City of Sherrill's foreclosure proceedings, asserting, among other grounds, their treaty rights. In 2001, U.S. District Court for the Northern District of New York ruled that the state's illegal alternation of the Oneidas' reservation land could not destroy the land's reservation status—only Congress could do this—and so the court declared such lands remained reservation lands that are exempt from state and local taxation like all other Indian reservation lands.[21] The Second Circuit affirmed.[22] The Supreme Court granted *certiorari*.

The Supreme Court assumed the correctness of the holding below that the Oneidas' land remained Indian reservation land. The Court nevertheless held that, because state and local governments had taxed and regulated the land for so long, equitable principles required federal courts not to enforce the property tax immunity or the tribal regulatory rights that ordinarily apply when an Indian tribe possesses its own reservation land.[23] Never before had the Court accepted state taxation or regulation of tribally possessed reservation land on equitable grounds and in the absence of any action by Congress to indicate that such land could be taxed.

Post-*City of Sherrill* Issues Regarding Application for Trust Land Status

The Supreme Court ended its *City of Sherrill* decision by noting the Oneidas should apply pursuant to 25 U.S.C. § 465 to have reacquired lands taken "into trust" if the Oneidas wanted them to enjoy the immunity from taxes and other state laws that ordinarily apply to tribal lands.[24] This means that, under *City of Sherrill*, Indian tribes across New York are not simply stuck with only the tribal land they were lucky enough to keep during the time when the State of New York was obtaining millions of acres of Indian land in violation of federal law.

The federal trust law provides a mechanism for a tribe to deed its land over to the United States, which accepts the deed and holds the land in trust for the use and benefit of the tribe. Land held in trust by the United States is "Indian country" under the key jurisdictional statute, 18 U.S.C. § 1151, and is protected by federal law in the same way that a formal Indian reservation is protected. Indian tribes cannot, however, just transfer land into trust as they wish; instead, the Secretary of the Interior must evaluate the proposed transfer to decide whether the land should be held in trust by the United States.[25] The federal courts have approved the statutory and regulatory regime guiding the Secretary's exercise of discretion, which is considerable.[26]

The trust land process is not novel. Today, about 55 million acres of land are held in trust by the United States for the benefit of roughly 300 Indian tribes, groups and individuals.[27]

In view of the Supreme Court's trust land comments in *City of Sherrill*, one can expect New York tribes to apply to have land taken into trust. The Oneidas, the Cayugas and the Akwesasne Mohawks have filed trust land applications with the Department of the Interior. The Oneida application concerns the approximately 17,000 acres of its reservation land that the tribe had reacquired prior the *City of Sherrill* decision.[28] The other tribes' applications are for less land.

There even is an application for trust land in New York from the Oneida Tribe of Indians of Wisconsin,[29] a tribe that has a federally recognized reservation in Wisconsin but nevertheless asserts land claims in Upstate New York because its ancestors once lived in—but later moved away from—New York. Because there are several tribes in places like Oklahoma, Wisconsin and Canada whose ancestors once lived in New York, there could be several more such applications from out-of-state

tribes for trust land in New York. The Department of the Interior, however, has never suggested that it is willing to use the trust land process to permit tribes with federally recognized reservations to establish trust land in other states.

The trust land process is not quick. From application to approval, six to twelve months is about the best that can be hoped for, and many applications languish for years. The trust regulations[30] provide a process for comment by state and local governments, and the Department of the Interior may hold public hearings. Because a decision by the Secretary of the Interior to take land into trust is a federal agency action, the provisions of the National Environmental Policy Act (NEPA) apply.[31] NEPA requires some level of environmental analysis and can, but does not necessarily, require an Environmental Impact Statement (EIS) and its attendant studies, analyses, comments and hearings, in connection with some trust land applications.[32] By regulation, the Department of the Interior now requires an EIS for most trust land applications where casinos may be built on the trust land pursuant to the Indian Gaming Regulatory Act.[33]

Post-*City of Sherrill* Issues Regarding Tax and Regulatory Enforcement

In *City of Sherrill*, the Supreme Court decided that equity prevents federal courts from protecting the tax immunity that ordinarily would apply to such lands, but the Court did *not* decide that state taxes, or for that matter regulation, can be enforced against tribes. To the contrary, the Supreme Court explicitly declined to disturb its 1985 *Oneida* decision which affirmed a money damages judgment for trespass against two counties that possessed land illegally alienated from the Oneidas in 1795. The 1985 *Oneida* decision recognized that the Oneidas' illegally alienated land is still subject to the Oneidas' right of possession, to federal treaty protection, and specifically to the protections of the Indian Trade and Intercourse Act,[34] which prevents transfers, even foreclosures, without the requisite federal approval. And the Supreme Court was clear in its 1991 *Potawatomi* ruling that while a state may have the legal right to collect taxes from an Indian tribe, the sovereign immunity of the tribe itself may bar enforcement actions. This is because tribal sovereign immunity protects the sovereignty of the tribe itself, and prevents actions against tribal assets, whether a truck, a bank account or land. Thus, while *City of Sherrill* provides that reacquired tribal land may not be immune from taxation, *Potawatomi* holds that a tribe may be immune from enforcement even as to validly imposed taxes, and by extension with respect to regulation.

These issues regarding inhibitions to enforcement of the taxing and regulatory power recognized in *City of Sherrill* already are playing out in post-*City of Sherrill* federal court litigation. The Northern District of New York recognized the Nonintercourse Act's restrictions against alienation by foreclosure,[35] and *Potawatomi*'s bar to enforcement of even valid taxes, as bars to country foreclosures on Oneida land on which property taxes have not been paid.[36]

Where Do We Go From Here?

Local governments and Indian tribes both face the same options for addressing the trust land and tax/regulatory enforcement issues that exist after the *City of Sherrill* decision. They can dig in their heels and continue many more years of costly fighting in court or they can work out cooperative agreements that are reasonable compromises meeting everyone's needs as much as possible. Agreements are preferable, stable and predictable. In *Potawatomi*, the Supreme Court expressly noted that Indian tribes and states could enter into cooperative agreements to resolve tax enforcement issues.[37]

As for the trust process, the Part 151 regulations envision the input of state and local governments. A variety of NEPA regulations envision state and local governments as "cooperating agencies" when formal environmental studies are done in connection with a proposed agency action.[38] "Cooperating agencies," by definition, should not be obstructive.

Whether it be a tax agreement or a trust land agreement, a compromise provides the most likely chance for both sides to accomplish something constructive and to end the conflict that is frustrating, costly and that can stymie the progress of *both* Indian and non-Indian communities.

It need not be hard to work out these issues. The Oneidas, who have far and away the most sizable trust land application of the New York tribes, some 17,000 acres, have only about 1.5% of the land in the two affected counties, a tiny fraction of the other, non-Indian tax exempt land in those counties used for military bases, schools, churches, post offices, parks—and even private businesses that benefit from generous Empire Zone tax exemptions (not to mention credits). The Oneida Nation is the largest employer in both counties—4,500 jobs and growing—and is the third largest employer in the sixteen-county Central New York region. Local leaders often support job growth by aggressively creating tax-exempt Empire Zones and often fight to save tax-exempt (and regulatory-exempt) military bases. This reality, coupled with the millions of dollars in grants, user fees and other payments from the Oneidas to local governments and schools, should put complaints about taxes into proper perspective.

Likewise, the regulatory impact of trust status is modest. State and local governments across the country live comfortably near the 55 million acres of Indian trust land in the United States. The last twenty years of the Oneida experience on reacquired lands show that there is no problem whatsoever. Throughout all of the disputes between the local municipalities and the Oneidas, nobody has genuinely disputed that Oneida regulations have exceeded state and local standards. The Oneidas have made agreements with respect to policing and services and have made clear they are eager to enter into more such agreements in the future.

Parties who are willing to compromise can reach agreements. Significantly, the City of Sherrill and the Oneidas—the parties before the Supreme Court—resolved their differences by entering into a sensible tax and regulatory compact after the Supreme Court's decision. The Oneida-Sherrill compact directly addresses and resolves tax and regulatory issues and brought the hopeful beginning of an era of cooperation.[39] Indian tribes across the United States enter into similar compacts and agreements with local municipalities to address a host of issues, such as policing, taxes and land use. As of the writing of this article, the Oneidas offered local governments more than $20 million to settle existing tax disputes *plus* a stream of payments into the future until land has been transferred to the United States to hold in trust.[40] But it takes two parties to compromise. To this point, county governments have showed no interest in working things out with the Oneidas.[41]

Hopefully, the future holds the promise of agreements that end conflicts about the status of Oneida lands—agreements that provide certainty and predictability to state, local and tribal governments concerning a reasonable tribal land base for Revolutionary America's steadfast ally, the Oneida Nation.

Endnotes

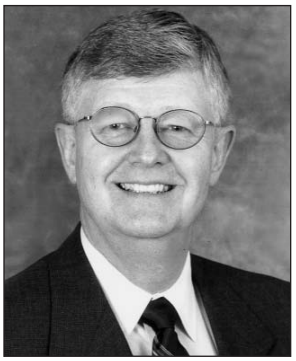
1. 544 U.S. 197, 125 S. Ct. 1478 (2005).
2. *City of Sherrill*, 125 S. Ct. at 1483.
3. *See id.* at 1493–94.
4. 498 U.S. 505 (1991).
5. The Tuscarora Indian tribe, however, also fought on the side of the colonists.
6. *See Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 533 & n.12 (N.D.N.Y. 1977) (citing Felix Cohen, Cohen's Handbook of Federal Indian Law 417-18 (1942 ed.)), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985) (*Oneida II*).
7. *See Oneida II*, 470 U.S. at 231.
8. 25 J. Cont'l Cong. 681, 687 (Oct. 15, 1783).
9. 7 Stat. 15 (Oct. 22, 1784).
10. 7 Stat. 33 (Jan. 9, 1789).
11. 25 U.S.C. § 177. Also commonly referred to as the Indian Trade and Intercourse Act.
12. *Oneida II*, 470 U.S. at 231, 233–34.
13. 7 Stat. 44 (Nov. 11, 1794).
14. *See Oneida Indian Nation*, 434 F. Supp. at 533.
15. *Id.* at 535.
16. *United States v. Boylan*, 265 F. 165 (2d Cir. 1920).
17. *Id.* at 174.
18. *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*).
19. *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) (*Oneida II*).
20. 145 F. Supp. 2d 226, 232 (N.D.N.Y. 2001).
21. *Id.* at 262.
22. 337 F.3d 139 (2d Cir. 2003).
23. *City of Sherrill*, 125 S. Ct. at 1492–93.
24. *Id.* at 1493–94.
25. *See* 25 C.F.R. pt. 151 (Department of Interior regulations regarding trust land process).
26. *See, e.g., Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005).
27. *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, *available at* <www.doi.gov/bureau-indian-affairs.html>.
28. *See* N.Y.S. Dep't of Environ. Conservation, Oneida Indian Nation: Request to Take Land into Trust, *at* <http://www.dec.state.ny.us/website/ogc/oneida/index.html>.
29. *See* Dan Guzewich, *Wisconsin tribe joins rival Oneidas in bid for tax-free land trust*, Sentinel Online (Rome, NY), Jan. 7, 2006, *available at* <http://www.rny.com/archive/localnews/2006/january/ 07wisconsintribejoinsrival.html>.
30. 25 C.F.R. pt. 151.
31. 42 U.S.C. §§ 4321, *et seq*.
32. *Tomac v. Norton*, 433 F.3d 852, 857 (D.C. Cir. 2006); *Carcieri*, 423 F.3d at 64–67.
33. 25 U.S.C. §§ 2701, *et seq*.
34. 25 U.S.C. § 177.
35. *Id.*
36. *Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219 (N.D.N.Y. 2005) (appeal pending).
37. 498 U.S. at 514.
38. *See Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1262 (D. Wyo. 2004).
39. Glenn Coin, *Oneida Nation to Pay Taxes*, Post Standard (Syracuse, NY), Oct. 6, 2005, at A1.
40. Alaina Potrikus, *Oneidas Offer $20 Million Toward Taxes*, Post Standard (Syracuse, NY), Jan. 22, 2006, at B1.
41. *See id.*

Peter Carmen is the General Counsel of the Oneida Indian Nation and its enterprises. The views expressed herein are his own and not those of the Nation.

Acquisition of Land by the United States in Trust for Indians and Indian Tribes

By David M. Schraver

Introduction



In 1934, Congress ended the system of allotting tribal lands to individual Indians or Indian families. Tribal lands had been allotted as early as 1798. The origins of the allotment system are found in numerous Indian treaties, but the policy culminated in the General Allotment Act of 1887.[1] This allotment system served the general purposes of federal Indian policy—break up tribal lands and tribal existence, facilitate the transfer of Indian lands to non-Indian ownership, and encourage Indians to become citizens and assimilate into the non-Indian society.

Congress passed the Indian Reorganization Act of 1934[2] during the New Deal Era, reflecting a new federal Indian policy to preserve communal ownership of tribal lands of Indian reservations. Section 5 of the 1934 Act[3] authorizes the

> Secretary of the Interior . . . in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.[4]

Although the legislative intent of 25 U.S.C. § 465 was to redesignate lands lost by the prior allotment policy of the United States, primarily in the West, as Indian country, Indian tribes have recently applied to have the United States take tribal fee land in New York State into trust.

City of Sherrill v. Oneida Indian Nation of New York

New York tribes have historically resisted having their lands taken into trust by the United States and moreover the land-into-trust process has not previously been used in New York. The recent applications[5] to have the United States take tribally owned fee lands into trust have been spurred by the March 2005 United States Supreme Court decision in *City of Sherrill v. Oneida Indian Nation of New York*.[6] The *Sherrill* case concerned properties in the City of Sherrill, New York, that were purchased by the Oneida Indian Nation of New York in the late 1990s. Long ago these lands were part of the Oneidas' historic reservation in northern Madison County and western Oneida County. After they purchased the parcels, the New York Oneidas took the position that they were exempt from real property taxation and refused to pay the assessed property taxes. The New York Oneidas sued the City of Sherrill in federal court to enjoin state court eviction proceedings and to prohibit the imposition of property taxes on their recently acquired properties.

In *City of Sherrill*, the Oneida Indian Nation (OIN) sought "declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations."[7] Although the Oneidas prevailed in the District Court and in the Second Circuit (2-1), the United States Supreme Court reversed the lower courts' decisions (8-1). "We now reject the unification theory of OIN and the United States and hold that 'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."[8] The Supreme Court went on to say that "the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences" in the City of Sherrill and Oneida County, which "today overwhelmingly [are] populated by non-Indians. . . . A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest—would 'seriously burden the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches."[9] The Supreme Court then directed the Oneidas to the land-into-trust process:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local

> taxation." . . . The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. . . . Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.[10]

The Oneida Indian Nation of New York's Application

Within days after the *Sherrill* decision, the Oneida Indian Nation of New York wrote to the Bureau of Indian Affairs:

> petition[ing] the Secretary of the Department of the Interior to accept the transfer of land from the Nation to the United States to be held by the United States in trust for the benefit of the Nation. All of the land is titled to the Nation in fee and is within the Oneida reservation acknowledged in the 1794 Treaty of Canandaigua and in other federal treaties.[11]

The lands that are the subject of the Oneidas' application constitute over 17,310 acres of land comprised of 444 parcels, largely non-contiguous and scattered over 10 towns in Madison and Oneida Counties.

Since the New York Oneidas filed their application, other tribes, namely the Cayuga Indian Nation of New York and the Oneida Tribe of Indians of Wisconsin, have applied to have land they own in New York State taken into trust by the United States. These other tribal applications are significantly smaller in size and scope than the application of the Oneida Indian Nation of New York.

The Regulations

As referenced above, the Part 151 Regulations "set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes."[12] An individual Indian or a tribe desiring to convert land into trust status must file a written request for approval of the acquisition. Although the request need not be in any special form, it must set out "the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of [Part 151]."[13] The land to be acquired may be either within a tribe's reservation or outside of and non-contiguous to it. Depending on whether the lands to be taken into trust are on-reservation or not, the criteria to be considered in evaluating the request are somewhat different.[14] In either case, "Indian reservation" is defined broadly to include:

> that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, . . . that area of land constituting the former reservation of the tribe as defined by the Secretary.[15]

The Department of the Interior has indicated it will treat the New York Oneidas' application as pertaining to on-reservation lands because they are within the boundaries of the historic 1788 treaty reservation and acknowledged in the 1794 Treaty of Canandaigua, even though the Supreme Court determined that the Oneidas cannot exercise sovereignty or jurisdiction over these lands unless they are taken into trust.

Whether or not the proposed acquisition involves on- or off-reservation lands, the Secretary must consider: (1) the existence of statutory authority for the acquisition and any limitations thereon; (2) the need of the individual Indian or the tribe for additional land; (3) the purposes for which the land will be used; (4) if the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax roles; (5) jurisdictional problems and potential conflicts of land use which may arise; (6) if the land to be acquired is in fee status, whether the Bureau of Indian Affairs (BIA) is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and (7) the extent to which the applicant has provided information that allows the Secretary to comply with the National Environmental Policy Act.[16] If the land is located outside of, and non-contiguous to, the tribe's reservation and the acquisition is not mandated, then in addition to the criteria described above, the Secretary must consider the location of the land relative to state boundaries and its distance from the boundaries of the tribe's reservation.[17] Furthermore, where land is being acquired for business purposes, a tribal plan that specifies the anticipated economic benefits associated with the proposed use must be considered.[18] In addition, the Secretary must notify state and local governments having regulatory jurisdiction over the land to be acquired and give such entities 30 days to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.[19] As the distance between the tribe's reservation and the land to be acquired increases, the Secretary is obligated to give greater scrutiny to the tribe's

justification of anticipated benefits and greater weight to the concerns of state and local governments as to potential impacts on regulatory jurisdiction, real property taxes and special assessments.[20]

The Secretary may request additional information[21] and must complete a title examination if the land is in unrestricted fee status.[22] Additionally, the Secretary may require the elimination of any liens, encumbrances, or infirmities prior to taking final approval action (and must require elimination if the liens, encumbrances, or infirmities make title to the land unmarketable).[23] The Department of the Interior has advised the New York Oneidas that it is departmental policy not to accept into trust lands that are encumbered by tax liens.[24]

The Appellate Process

Once the Secretary has made a decision on the application, it may be appealed to the Interior Board of Indian Appeals (IBIA).[25] The IBIA's action may be challenged in an action against the Secretary in the United States District Court. Among the issues that might be raised are whether the Secretary had authority under the Indian Reorganization Act to acquire the particular land in trust, whether the Indian Reorganization Act constitutes an unlawful delegation of congressional authority or otherwise offends the Constitution, and whether the Secretary's acceptance of the land into trust was arbitrary, capricious, or an abuse of discretion in violation of the Administrative Procedures Act or was otherwise not in accordance with the law.

Conclusion

Applications to take land into trust pursuant to 25 U.S.C. § 465 are new to New York State. In view of the legislative intent of this section to reverse the prior allotment policy of the United States that was implemented in the western states and which had nothing to do with New York State, there may well be a question as to whether applications to take land into trust in New York should be permitted under this statute. How the process will work and what decisions the Secretary will make on such applications remain to be seen. The potential impacts on the state and local governments, as well as on the tribes, are significant, particularly in the case of an application such as the New York Oneidas' involving the 17,000-acre checkerboard reservation that was specifically discussed in the *Sherrill* case. As this process unfolds, it will be critically important for all interested stakeholders to be aware of the process and to participate in it at every possible opportunity. Whether and how this process is applied in New York State could have profound economic, jurisdictional, legal, political, and social impacts on tribal and non-Indian communities across New York State.

Endnotes

1. Commonly known as the Dawes Act, 24 Stat. 388 (Feb. 8, 1887). *See generally* Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 11 (2005 ed.).
2. 25 U.S.C. § 461.
3. 25 U.S.C. § 465.
4. *Id*. The Department of the Interior's regulations governing such acquisitions of land by the United States are found in 25 C.F.R. pt. 151.
5. The fee to trust land applications of the Oneida Indian Nation and the Cayuga Indian Nation and the State of New York's comments are available from the Department of Environmental Conservation *at* <http://www.dec.state.ny.us/website/ogc/lands.html>. Comments on these applications by Madison County and Oneida County are also available. Madison County has posted its response to the application *at* <http://www.madisoncounty.org/motf/MadCoSJCOINTrustAppComments.pdf>. Oneida County's response is *available at* <http://www.oneidacounty.org/oneidacty/issues/landclaim/landclaim1index.htm>.
6. 544 U.S. 197, 125 S. Ct. 1478 (2005).
7. *City of Sherrill*, 125 S. Ct. at 1489 (footnote omitted).
8. *Id.* at 1489-90 (citations omitted).
9. *Id.* at 1493 (citations omitted).
10. *Id.* at 1493-94 (citations omitted).
11. April 4, 2005 letter from Oneida Indian Nation to Eastern Regional Office, Bureau of Indian Affairs, *available at* <http://www.dec.state.ny.us/website/ogc/oneida/oinrequest.pdf>.
12. 25 C.F.R. § 151.1.
13. *Id.* § 151.9. The application of the New York Oneidas involving over 17,000 acres of land was a one and one-half page letter with several pages of schedules listing particular parcels attached. The Bureau of Indian Affairs has accepted the letter as an "application," but one could question whether it contains sufficient information to show that the proposed acquisition comes within the terms of the regulations.
14. *Compare* 25 C.F.R. § 151.10 on-reservation acquisitions, *with* 25 C.F.R. § 151.11 regulation of off-reservation acquisitions.
15. 25 C.F.R. § 151.2(f).
16. *Id.* § 151.10(a)-(c), (e)-(h).
17. *Id.* § 151.11(b).
18. *Id.* § 151.11(c).
19. *Id.* § 151.11(d).
20. *Id.* § 151.11(b).
21. *Id.* § 151.12(a).
22. *Id.* § 151.13.
23. *Id*.
24. June 10, 2005 letter from Associate Deputy Secretary of the Interior to Oneida Indian Nation.
25. *See* 25 C.F.R. pt. 2.

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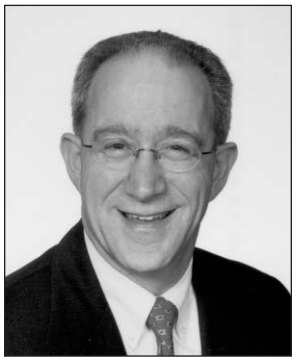
Impact of *City of Sherrill v. Oneida Indian Nation of New York*

By S. John Campanie

Introduction and Background



I have been asked to provide a perspective as to the impact of the U.S. Supreme Court's March 29, 2005, decision in *City of Sherrill v. Oneida Indian Nation of New York*.[1] In short, the impact is monumental.

First, some background. The roots of the dispute in *Sherrill* emanate from transactions occurring in the 18th and early 19th centuries, with the "current" litigation stretching back decades. The challenges have been and remain multifaceted. Numerous tribes claimed millions of acres throughout New York State and sought ejectment and damages in the billions.[2] After decisions eliminating ejectment as a remedy[3] and questioning the availability of damages 200 years after the fact,[4] tribes are currently seeking to restore long lost sovereignty by applying to the federal government to take vast tracts of land into trust to create Indian Country throughout New York.[5]

Beginning in the 1970s, tribes enjoyed significant success in making these claims, directly related to the failure of the state and local governments to react and properly defend.[6] This culminated in the Supreme Court's 1985 decision in *County of Oneida v. Oneida Indian Nation of New York*,[7] which held that the Oneida Indian Nation of New York ("OIN") stated a triable claim for damages against the counties "for wrongful possession of lands" conveyed to New York State in 1795 "in violation of federal law."[8]

Oneida Indian Nation of New York Land Acquisitions

Following the *Oneida II* decision, and using their enormous casino wealth generated from the Turning Stone Casino, the OIN acquired over 17,000 acres—in a very short period of time—scattered over Madison and Oneida counties and twenty-two cities, towns, villages and school districts. Upon acquisition of the parcels, the OIN unilaterally treated the property as Indian Country, free from local and state regulation and taxation.

The effects of these acquisitions have been profound. Our citizens lost their fundamental right to govern their own communities. It has been the OIN's position that their checkerboard of parcels was not subject to any local regulation, including local zoning, planning, building or environmental controls—and they have operated in that fashion. While some properties have been developed (albeit in certain instances contrary to local master plans and zoning), others have been neglected and left to deteriorate.[9]

> *"In short, the impact* [*of* Sherrill] *is monumental."*

Although having received the benefit of services and municipal infrastructure on which their enterprises and people depend for their extraordinary success,[10] the OIN and its enterprises paid no real property taxes, refused to collect and remit sales taxes on sales to non-Indians, and made no other binding contributions except service agreements for discrete services in a few localities.[11] They provided, as some mitigation, "silver covenant gifts" to school districts but, as the small Stockbridge Valley Central School District learned from bitter experience, the OIN could and would revoke those gifts at their will.[12] The financial impact on the local municipal units has been severe. Given the size of Madison County's budget, if accrued and current real property taxes and current sales taxes were collected, Madison County could cut its real property taxes dramatically and begin to restore essential services such as bridge and highway repairs.[13]

The OIN acquisitions and expansion have been predatory. Lands have been acquired not to assemble a contiguous, comprehensive, and governable reservation, but for commercial advantage.[14] They have achieved a near monopoly in gas stations and convenience stores in the claim area,[15] and sell gasoline at 5 cents or more per gallon less than the local competition, reaping all of the taxes (including excise taxes) in addition to the normal profit. Their tax advantage is not translated into materially lower prices, nor is their regulatory advantage. Meanwhile, their competition (those who remain) pay all real property taxes, are subject to ordinary regulation designed to protect the public such as environmental controls, weights and measures, public health provisions, etc., and collect and remit sales taxes to support the highway systems that bring customers to their door.[16] In all likelihood, OIN will increasingly use their immense advantage to target

additional business opportunities as the need to devote excess capital to the local gaming and convenience store businesses diminishes.[17]

Continuing Litigation

Elsewhere in the State, other tribes were active. The Cayuga Indian Nation of New York acquired lands in the Village of Union Springs, established a tax-free gas station, and proceeded with plans to open a gaming establishment in violation of zoning and land-use laws. The Village responded by issuing stop work orders. The Cayuga Indian Nation claimed, however, that it was exempt from such laws because the property lay within Indian Country (as that phrase is defined in 18 U.S.C §1151(a)), and commenced an action seeking declaratory and injunctive relief.[18] U.S. District Court Judge David Hurd decided in favor of the Cayugas and a permanent injunction was issued which enjoined the Village from, among other things, "applying or enforcing [its] zoning and land use laws" in relation to the Cayugas' activities on the property.[19] Judge Hurd determined that "given the Indian Country status of the Property," the defendants were "without authority or jurisdiction, and [were] preempted from, applying or enforcing [their] zoning and land use laws" as to the same.[20]

Likewise, the City of Sherrill and Madison County challenged the Indians' activities. The City of Sherrill, under its tax act and the County of Madison under Real Property Tax Law Article 11, sought to foreclose on the OIN properties for non-payment of tax. The OIN commenced federal actions, also before Judge Hurd, concluding that the areas in the City of Sherrill and in Madison County were Indian Country, that those areas were not taxable, and that the city and county were enjoined from proceeding.[21] A divided panel of the Second Circuit affirmed as to the City of Sherrill[22] and the Supreme Court of the United States granted the City's petition for writ of certiorari.[23]

The Supreme Court (8-1) reversed the judgment of the Court of Appeals. In a decision written by Justice Ginsburg, the Court recognized that for two centuries, governance of the area had been provided by the State of New York and its county and municipal units and therefore declined "to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns" and held "that the tribe can not unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue."[24] In reaching its decision, in the words of the Second Circuit Court of Appeals in *Cayuga Indian Nation of New York v. Pataki*, the Supreme Court concluded "that equitable doctrines—such as laches, acquiescence, and impossibility—can be applied to Indian land claims in appropriate circumstances."[25]

Effect of *Sherrill*

The effect of the *Sherrill* decision was profound. First, it reaffirmed and restored to the State, its localities and their citizens the jurisdiction and governance they had enjoyed for 200 years. Accordingly, in the follow-up to *Union Springs*, Judge Hurd reversed his earlier decision, granted the Village's motion to vacate the judgment, and dismissed the complaint of the Cayugas, finding that "the Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the everyday administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations."[26]

Secondly, the Court's decision effectively eliminated the viability of the Indian land claims pending throughout New York. The Court of Appeals for the Second Circuit on June 28, 2005, applying *Sherrill* to the Cayuga Indian Nation of New York and Seneca-Cayuga Tribe of Oklahoma land claims, reversed District Court Judge Neil P. McCurn and entered judgment for defendants, eliminating an approximately $248 million judgment in favor of the tribes. The Court stated, "[b]ased on *Sherrill*, we conclude that the possessory land claim alleged here is the type of claim to which a laches defense can be applied. Taking into account the considerations identified by the Supreme Court in *Sherrill* and the findings of the District Court in the remedies stages of this case, we further conclude that the plaintiffs' claim is barred by laches."[27]

Continuing Battle: Jurisdiction and Trust Applications

While *Sherrill* has been monumental—and I believe stands for the propositions that the pending claims of various tribes for lands in Madison and Oneida counties will be dismissed[28] and that they may no longer assert jurisdiction to the derogation of the State, its localities and citizens—the matter is not yet concluded.

With respect to state and local jurisdiction, Judge Hurd on October 27, 2005, in the context of cross-motions for summary judgment in the Madison County tax foreclosure case, held that although under the *Sherrill* decision the OIN was not immune to real property tax, "the remedy of foreclosure is not available to the County," stating "the Nation owes real property taxes to the County. However, the County may not, in effect, seize lands owned by the Nation in order to collect those taxes. It must find an alternate method to satisfy the Nation's debt to the County."[29] Similar cases are pending before Judge Hurd involving tax foreclosures by the County of Oneida and the City of Oneida, and Madison County has filed its appeal with the Second Circuit Court of Appeals.[30]

The second exposure concerns the application by several tribes for the federal government to take tribal-owned fee lands into trust and to effectively establish Indian Country status, thereby eviscerating state and local municipal unit jurisdiction. In this connection, the tribes have argued that the Supreme Court in *Sherrill* established a "road map" permitting this remedy. The counties argue quite the contrary.

It is the position of the counties that while the Supreme Court at the conclusion of its decision in *Sherrill* identified the process under Title 25 U.S.C. § 465 as a mechanism and methodology to evaluate the potential establishment of Indian Country status to some area of Indian lands, the thrust of the decision was that such an analysis must be in the context of its decision in *Sherrill*.

The importance of *Sherrill* in the evaluation and determination of any application under Title 25 U.S.C. § 465 cannot be overestimated. While the Bureau of Indian Affairs previously may have evaluated and determined trust applications on bases different from those articulated by the Court, the Bureau may no longer do so. As recognized by the Second Circuit in Cayuga, *Sherrill* has "dramatically altered the legal landscape."[31]

The Supreme Court in *Sherrill* began by recognizing that "[f]or two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units" and recognized that the area today is "overwhelmingly populated by non-Indians."[32] The essence of its decision was the acknowledgment of the importance of the existing, long-standing governance of Central New York by the state, counties and local municipal units, and the preservation of such governance.[33] In reaching its decision, the Court looked to the jurisdictional history and "the justifiable expectations of the people living in the area" and observed that "the appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory."[34] The Court concluded that such justifiable expectations "grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently untested by OIN, merit heavy weight here."[35]

The Court repeatedly acknowledged the long-standing non-Indian governance, the disruption that the disturbance of that governance would engender, and the "attendant dramatic changes in character of the properties"[36] that would result from the reassertion of OIN sovereign control. In rejecting this result, the Court recognized the unacceptability of checkerboard sovereignty[37] and its adverse impact on "local zoning or other regulatory controls that protect all landowners in the area."[38]

After establishing the fundamental importance of the preservation and protection of this long-standing state and local jurisdiction, the Court—near the conclusion of its opinion—suggested that if the OIN were to seek "sovereign authority over territory"[39] there is a process under which it could be evaluated, not a guarantee that it will be granted as the OIN appears to expect.[40]

The recognition of a process through which this can be considered does not diminish the principles the *Sherrill* Court established, and the same factors must be considered and applied in the Secretary's evaluation, including: (1) 200 years of state and local governance; (2) the overwhelming non-Indian population and its justifiable expectations; (3) checkerboarding as seriously burdening the administration of state and local governments and having adverse impact on the landowners of neighboring patches; and (4) the attendant dramatic changes in the character of the properties should the application be granted (including the freeing of the parcels from local zoning and other regulatory controls that protect all landowners in the area). As stated by the Court, in addition to these factors, among other things the Secretary must consider are "the Tribe's need for additional land"; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise."[41]

While the Court pointed to Title 25 U.S.C. § 465 and the regulations promulgated thereunder, it requires an application of the principles established by the Court, and under such analysis I believe the OIN application must be denied.

Conclusion

Certainly the legal landscape has changed and the Court's decision in *Sherrill* is in fact monumental. At the oral arguments before the Supreme Court in January 2005, I was struck by the simple fact that the Court was extraordinarily well-informed and immediately grasped the essence of the dispute. While payment of taxes was an issue, the real concern was whether our citizens would continue to be self-governing in their own communities, or face a chaotic checkerboard of conflicting jurisdictions which would destabilize communities and deprive ordinary citizens of fundamental rights. With this decision, the Supreme Court has provided both clear direction and the basis on which those involved may finally achieve success in the struggle to protect and preserve the governance of the state, the local municipal units, and most importantly, our citizens.

Endnotes

1. 544 U.S. 197, 125 S. Ct. 1478 (2005) ("*Sherrill*").
2. For example, claims have been asserted by various Oneida, Cayuga, Seneca-Cayuga, Seneca, and Mohawk tribes, as well as the Shinnecock on Long Island. *See, e.g.*, *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005).
3. *Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61, 91-93 (N.D.N.Y. 2000).
4. *Cayuga Indian Nation*, 413 F.3d at 278.
5. Applications are currently pending for the Oneida Indian Nation of New York, Oneida Tribe of Indians of Wisconsin and Cayuga Indian Nation of New York. *See* New York State Dep't of Environmental Conservation, Indian Nation Fee-to-Trust Land Acquisition Applications in New York State, *available at* <http://www.dec.state.ny.us/website/ogc/lands.html>.
6. In the Oneida land claim litigation this included no introduction of proof by the defendants; failure of NYS to take responsibility to defend at the trial level; and plaintiff's intentional and successful crafting of the claim (now conveniently called "test case") to avoid provoking an appropriate defense. When the Oneida's first action, the 1970 case, was finally tried on remand the historical evidence presented was only offered by an Indian engaged expert. By contrast, the state and counties are currently mounting a vigorous defense which in 2004 successfully challenged the Indians' expert in the discovery phase of the Oneidas' 1974 case which is still pending.
7. 470 U.S. 226 (1985) ("*Oneida II*").
8. *Sherrill*, 125 S. Ct. at 1483 (discussing the Court's prior holding in *Oneida II*).
9. For detailed information, see the responses of Madison and Oneida counties and the State of New York to the OIN trust application. <http://www.madisoncounty.org/motf/MadCoSJCOINTrustAppComments.pdf> *and* <http://www.oneidacounty.org/oneidacty/issues/landclaim/landclaim 1index.htm>.
10. By their own account, the 1,000-member New York Oneida Tribe grossed $200 million in the first year of operation of their Turning Stone Casino in 1993. More recent accounts derived from financial transactions put their annual *net* at $70 million. Last year, the Tribe itself announced that it now has assets in excess of $1 billion. It continues to have the benefit of what has been judicially determined to be an illegal casino and the massive profits that the casino generates. *Looking at the Land Claim Attorney: "An Admirable Effort,"* Post Standard (Syracuse, NY), Mar. 17, 2005, at 3.
11. Even those agreements were underfunded and subject to both revocation and terms of adhesion. See, for example, the Verona Fire Department's submission attached to the report of O'Brien and Gene on behalf of New York State. New York State Dep't of Environmental Conservation, New York's comments to Oneida Indian Nation's Land In Trust Application in PDF format, *Appendix F*, *available at* <http://www.dec.state.ny.us/ website/ogc/oneida/nyscomments.html>.
12. The OIN demanded that the Stockbridge Valley Central School District fire a teacher with whom they had a political dispute. After a thorough investigation and the District's determination that there were no grounds to fire the employee, the OIN revoked its gift and plunged the School District into a period of financial chaos. The impact was dramatic, given that the Oneidas' holdings represent 25% of the real property in the District, as is more fully explained in the affidavits of School Superintendent Randy C. Richards and Board President Michael P. Oot dated June 21 and 20, 2005, respectively, submitted in responding papers in tax enforcement litigation. Copies of these affidavits are available at Madison County homepage, *at* <http://www.madisoncounty.org/motf/AClaimhome.htm>.
13. For further information regarding the impact, see the Madison County trust comments, the O'Brien & Gere and Center for Governmental Research reports, as well as the affidavits of Madison County Treasurer Harold Landers and Highway Superintendent Joseph Slivinski dated September 2, 2005, submitted with the County responding papers in recent tax enforcement litigation. Also see the statement of Joseph Slivinski at the January 11, 2006, NEPA scoping hearings. Copies of the affidavits and scoping submission are attached as Exhibits G, H and I, respectively, to the Madison County trust comments, which together with the reports can be found at the Madison County Homepage, *at* <www.madisoncounty.org>.
14. The OIN owns many of the key commercial properties and intersections throughout Madison and Oneida Counties land claim area, including strip malls, significant tracts at both New York State Thruway interchanges, intersections of major state highways, and at the intersection of the New York State Barge Canal with Oneida Lake, as well as most of the valuable marina properties along the southeast and east shore of Oneida Lake. Purchases of all types of properties continue.
15. Including a complete monopoly on the east shore of Oneida Lake.
16. In contrast, the OIN has done what it wants, where it wants, recently clear cutting and filling a densely wooded wetland in the hamlet of Verona Beach, near Oneida Lake, to erect a large-scale convenience and grocery store in direct competition with a recently established non-Indian individual operator.
17. Oneida Leader Ray Halbritter's thrust for many years has been the development of economic power. In a law review article in 1994 he asserted, "Economic power in this country, and in this world, is the real power." Ray Halbritter & Steven McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. Int'l L. & Pol. 531, 564 (1994). In 1996, at Syracuse University's graduate school of business, he reiterated that economic power is the foundation for political power and advocated for Indian lands as free-trade zones, enjoying tax advantages to encourage businesses to locate there. David Tobin, *Halbritter focuses on Enterprise in Talk the Oneida Leader Spoke to Business Students at his Alma Mater, Syracuse University*, Post Standard (Syracuse, NY), April 4, 1996, at B3. On November 8, 2002, that vision was further articulated by Nation lawyer Eric Facer in a presentation at Syracuse University College of Law, in which the locating of businesses on tribal lands was advocated, touting tax and regulatory benefits, as well as potential benefits of Indian sovereign immunity. Facer advocated chartering entities under tribal laws and gave a specific example in which a New York State not-for-profit, for educational and health purposes, wanted to incorporate but did not want to face the required approvals by the State Education Department and New York State Health Department. He said we "avoid red tape" and that, in fact, is what the entity had done.
18. *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) ("*Union Springs*").
19. *Union Springs*, 317 F. Supp. 2d at 151-52.
20. *Id*. at 136, 151-52.
21. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp 2d 226, 254-259 (N.D.N.Y. 2001).
22. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003).
23. *City of Sherrill. v. Oneida Indian Nation of New York*, 542 U.S. 936, 125 S. Ct. 1478 (2004).
24. *Sherrill*, 125 S.Ct. at 1483.
25. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 275 (2d Cir. 2005), *citing Sherrill*, 125 S. Ct. at 1494.

26. *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005).
27. *Cayuga*, 413 F.3d at 268.
28. The tribes include the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames, the Stockbridge-Munsee Community, and the New York Brothertown Indian Nation.
29. *Oneida Indian Nation of New York v. Madison* County, 401 F. Supp. 2d 219, 232 (N.D.N.Y. 2205).
30. Unpaid real property taxes in Madison and Oneida counties currently aggregate approximately $34 million. In addition, millions in sales taxes annually go uncollected.
31. *Cayuga*, 413 F.3d at 273.
32. *Sherrill* 125 S. Ct. at 1483, 1493.
33. "Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Id.* at 1483.
34. *Id.* at 1490.
35. *Id.* at 1491.
36. *Id.*
37. "A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN's behest—would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *Id.* at 1493, *quoting Hagen v Utah,* 510 U.S. 399, 421 (*quoting Solem v. Bartlett*, 465 U.S. 463, 471–472 n. 12 (1984)).
38. *Sherrill*, 125 S. Ct. at 1493.
39. *Id*. at 1494.
40. The OIN Application consists of a two-page letter and is devoid of detail, neither establishing need nor addressing the considerations set forth in the *Sherrill* decision and the Secretary's regulations under the land-into-trust process.
41. *Sherrill*, 125 S. Ct. at 1494, *quoting* 25 CFR § 151.10. Essentially none of which are addressed in the application. *See* Oneida Indian Nation, Oneida Indian Nation/Request to Take Land into Trust Letter, *available at* <http://www.dec.state.ny.us/website/ogc/oneida/oinrequest.pdf>.

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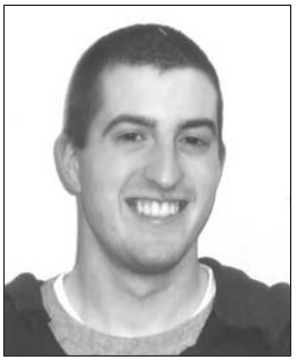
Editor's Note: Some of the material in this article was previously prepared by the author on behalf of Madison County in its response to the land into trust application of the Oneida Indian Nation of New York. http://www.madisoncounty.org/motf/MadCoSJCOINTrustAppComments.pdf.

Laches at Law: The Second Circuit and the *Cayuga* Case

By Matthew Leonardo



In *Cayuga Indian Nation v. Pataki*,[1] the Second Circuit became one of the first jurisdictions to apply laches to a legal claim. The magnitude of this decision has not yet reverberated through other jurisdictions and may yet be reviewed by the Supreme Court. Laches is an ancient equitable doctrine historically used to bar stale claims in equity. The elements of laches, unjustifiable delay and prejudice to the adverse party,[2] have dictated its primary use as a defense by the non-complaining party. The revolutionary step taken by the Second Circuit was to apply this equitable defense to an action at law. In this case, the court used laches to bar a claim of ejectment brought by the Cayuga Nation of New York, for dispossession of ancestral lands. The court's decision as such is within the context of Indian land claims. Indian land claim litigation presents unique obstacles to broad analysis because such claims are subject to special rules and circumstances that arise from the guardian-ward relationship between Native Americans and the federal government. Although each of these considerations will be discussed in turn, the focus of this article will be the issues related to the novel application of laches to an action at law. That is to say, this article is primarily concerned with the court's reasons for applying laches at law, consequential implications for the doctrine itself, and the distinctions between law and equity. To establish a proper context, a short review of federal Indian jurisprudence is required. This article will attempt to identify the unique problems of Indian land claim litigation and reconcile them with the general principles of equitable jurisprudence. However, the issues identified are not exhaustive and are discussed only in relation to laches. Thus, through the context of Indian land claims, this article seeks to analyze and critique the doctrine of laches and its applicability to actions at law.

History

I. Background to Indian Land Claim Litigation

A. Prior to *City of Sherrill* decision

In a 1795 treaty with New York State, the Oneida Indian Nation of New York ("OIN") conveyed 100,000 acres of reservation land to New York State.[3] This conveyance was not approved by the United States, as required by the Indian Trade and Intercourse Act, also known as the Nonintercourse Act. The Nonintercourse Act of 1790 was followed by the 1794 Treaty of Canandaigua. The treaty recognized an arrangement between OIN and New York whereby OIN ceded all its lands to the state in return for a 300,000-acre reservation.[4] This treaty, although broken repeatedly by the state and federal governments, has never been rescinded and remains in effect presently. Similarly, the 1790 Act has not been substantially modified since its passage and is codified at 25 U.S.C. § 177. In 1970 OIN instituted a civil action in federal district court in the Northern District of New York, seeking damages for the fair rental value of the occupied land of the 1795 conveyance.[5] OIN sought damages, measured by the fair rental value, for the years 1968 and 1969, of 872 acres of ancestral land occupied by two New York counties. OIN argued that the conveyance of over 100,000 acres of tribal land was in violation of the Nonintercourse Act and thus did not terminate OIN's right to possession. Both the district and circuit courts dismissed the complaint for failure to state a federal claim. The Supreme Court reversed and found that "a tribal right to occupancy, to be protected, need not be 'based upon a treaty, statute or other formal government action.' Tribal rights . . . [are] entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the power of Congress is supreme."[6]

In *County of Oneida v. Oneida Indian Nation of New York*, commonly referred to as *Oneida II*, the Supreme Court recognized that the Oneida Nation could maintain its claim to be compensated "for violation of their possessory rights based on federal common law."[7] Thus, after establishing that the Oneida Nation had properly invoked federal jurisdiction in *Oneida I*, the Court further held, in *Oneida II*, that OIN had a cognizable legal claim to its ancestral land that had been acquired in violation of the Nonintercourse Act and the 1794 Treaty of Canandaigua.[8] The recognition of a federal right led other tribes, as well as the Oneidas, to attempt to assert their lost sovereignty and ownership over lands possessed by local governments and private landowners. In 1997 and 1998, OIN purchased parcels of land in Sherrill, New York that had once been within the historic Oneida Reservation, but were last possessed by OIN in 1805. After purchasing the property, OIN refused to pay property taxes assessed by Sherrill, claiming immunity based upon its right of sovereignty.[9]

B. City of Sherrill

The City of Sherrill brought a state tax foreclosure eviction suit in state court, which OIN removed to federal jurisdiction.[10] In contrast to *Oneida I* and *II*, where OIN sought damages equal to the fair rental value for

the years of 1968 and 1969, OIN instead opted to pursue equitable relief in the form of an injunction. In this action, OIN sought equitable relief enjoining the current and future imposition of taxes. The case was eventually brought before the Supreme Court. OIN argued that its acquisition of fee title to parcels of the historic reservation revived OIN's ancient sovereignty piecemeal over each parcel so acquired so as to preclude Sherrill's regulatory power of taxation. The Court ruled in *City of Sherrill v. Oneida Indian Nation of New York* that the long-standing, distinctly non-Indian character of the region, the continuous regulatory authority exercised by the state for two hundred years, and the delay in seeking equitable relief precluded the tribe from asserting its sovereignty over the property.[11] Thus, the Court determined that a balancing of the equities favored the justifiable expectations of the City of Sherrill and contiguous landowners.

The Court applied several doctrines that effectively precluded OIN's recovery. The Court first noted that OIN's acquiescence and, in fact, participation in the long-standing regulatory scheme was an obstacle to recovery, analogizing OIN's assent to New York's governance to state recognition of an erroneous boundary.[12] They reasoned that "the acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary."[13] Thus, exercise of dominion and sovereignty over an area may preclude outside claims to sovereignty over the territory. The Court gave this proposition force in *Ohio v. Kentucky* where it stated that "long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."[14] Therefore, OIN was barred from injunctive relief partially by its own actions.

Additionally, the Court determined that the subsequent "checkerboard of state and tribal jurisdiction in New York State—created unilaterally at OIN's request—would seriously burden the administration of state and local governments."[15] The Court found that the "longstanding assumption of jurisdiction by the State over an area that is [predominantly non-Indian], both in population and land use, creat[ed] justifiable expectations."[16] Indeed, the Court, quoting *Yankton Sioux Tribe v. United States*, determined that it was "impossible to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers."[17] The Court found that the "unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine."[18] Thus, the disruptive nature of the remedy and the threat of future litigation over zoning and other regulatory controls led the Court to conclude that a grant of the requested relief would be impractical and would severely burden innocent landowners.

Lastly, the Court applied the equitable defense of laches to the Oneidas' request for injunctive relief. In doing so, the Court reasoned that although OIN brought the action promptly after acquiring title, this did not overcome the Oneidas' failure to reclaim ancient prerogatives earlier or lessen the problems associated with upsetting New York's long-exercised sovereignty over the area.[19] The two elements of laches, unjustified delay by the one seeking relief resulting in prejudice to the rights of the other party, are based, in this action, on the legal rights obtained by OIN in *Oneida II*. The Court emphasized the equitable nature of the laches defense, stating, "laches is not . . . a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."[20] Thus, New York's two centuries of uncontested and continuous exercise of regulatory jurisdiction coupled with the drastic change in attendant circumstances effectively precluded OIN from receiving equitable relief.

The Court's conclusion in *City of Sherrill* followed logically from its holding in *Oneida II*. In *Oneida II*, the Court had recognized the right to an action at law for damages relating to the unlawful dispossession of ancestral lands. The Court explicitly reserved the question "whether equitable considerations should limit the relief available to present day Oneidas."[21] Presented with an action at equity in *City of Sherrill*, the Court refused to expand the remedies beyond the damages awarded at law. The Court delineated the cases as the difference between rights and remedies. Quoting Dobbs' *Law of Remedies*, the Court stated, "the substantive questions whether the plaintiff has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is."[22] More so to the issue, the Court declared, there is a "sharp distinction between the *existence* of a federal common law right to Indian homelands . . . and how to *vindicate* that right."[23] Therefore, the Court's decision in *City of Sherrill* is in accord with *Oneida II* insofar as Indian tribes retain a possessory right to ancestral land but may be limited in the remedy to that right. These two cases frame any relevant discourse on Indian land claims, and will be the lens through which the logic of subsequent decisions is analyzed.

II. Procedural History of *Cayuga Indian Nation v. Pataki*

Similar to OIN, the Cayuga Nation of New York lost much of its reservation land through a series of invalid conveyances. The Cayugas, like OIN, were party to the 1794 Treaty of Canandaigua, which recognized the sovereignty of those tribes over reservation lands. Shortly after this treaty took effect, however, New York State acquired the whole of the Cayuga reservation without the required approval from the federal government.[24] In 1980, the Cayugas filed a complaint requesting that the court declare the tribe "'owners of and have the legal and equitable title and the right to possession to all of the land in the Original Reservation' [found in the 1794 treaty]" and to "'restore [them] to immediate possession . . . of the subject land.'"[25] The tribe then moved to certify a class of defendants, which included New York State. In 1981, the Seneca-Cayuga tribe of Oklahoma was granted leave to intervene as plaintiff-intervenor.

After extensive discovery and numerous motions to dismiss, the district court granted partial summary judgment on liability to the plaintiffs against all defendants, except the State of New York, which asserted an Eleventh Amendment defense, based on the then-recent Supreme Court decision in *Blatchford v. Native Village of Noatak*.[26] The remaining defendants moved to dismiss on the grounds that the state was an indispensable party. Additionally, in response to New York's Eleventh Amendment defense, the United States moved to intervene on behalf of itself and on behalf of the plaintiffs as their ward. After a stay in the proceedings for settlement discussions, which lasted over three years, the court determined that although the state was entitled to immunity under the Eleventh Amendment, its officials could be sued in their official capacity. The court also rejected the claim that the state was an indispensable party. Finally, in 2001, the trial court had ruled on all of the liability issues and had found for the plaintiff, awarding damages and prejudgment interest in the amount of $247 million.[27]

III. Second Circuit Ruling on *Cayuga v. Pataki*

On appeal the circuit court made several critical characterizations of the action at hand that led them inexorably to its decision. The circuit court's first determination, one which would have consequences to its subsequent analysis, was that the Cayugas primarily sought an ejectment, with a remedy of immediate possession.[28] This allowed the appellate court to characterize the Cayugas' action as a possessory land claim. As such (through its analysis) the Cayugas' action was under the controlling authority of the Supreme Court's *City of Sherrill* decision. According to the circuit court, "the [Supreme] Court's characterizations of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself."[29] Accordingly, the circuit court inferred that "the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally."[30] The circuit court obscured its flawed logic by decisively declaring "this conclusion is reinforced by the fact that the *Sherrill* opinion does not limit application of these equitable defenses to claims seeking equitable relief."[31] Thus, the court effectively preempted discussion of the applicable doctrines by determining first, that this was an action for a possessory land claim and second, *Sherrill* barred such claims by equitable defenses.

The circuit court first sought to support its findings through its characterization of the Cayugas' action as one primarily of ejectment. The circuit "emphasize[d] that plaintiff's claim is and has always been one sounding in ejectment; plaintiffs have asserted a continuing right to immediate possession as the basis of all their claims, and have always sought ejectment of the current landowners as their preferred relief."[32] This led the circuit, relying on the findings of the district court, to determine that ejectment was, "to put it mildly . . . not an appropriate remedy in this case."[33] The circuit noted the disruptive nature of the remedy—namely, the removal of thousands of landowners with settled title and reasonable confidence in the security as such—to conclude that the nature of the claim was purely possessory. From this, the court determined that such a remedy was subject to those equitable defenses enumerated in *Sherrill*.[34] Despite the Cayugas' insistence that equitable defenses could not bar a legal claim, the circuit court dismissed this contention on the grounds that such a defense could apply to any relief sought that would "project redress . . . into the present and future."[35] In doing so, the circuit court sidestepped a crucial nexus in its analysis. In footnote 5, the court declared that "even though ejectment has traditionally been an action at law, numerous jurisdictions have recognized the applicability of equitable defenses, including laches, in an action for ejectment based on a claim of legal title or prior possession, regardless of whether damages or an order of possession was sought."[36] As ancillary support for this conclusion, the court noted the inherent difficulties in translating ordinary common law principles to Indian land claims.[37] The court determined that "in light of the unusual considerations at play in this area of the law . . . we see no reason why the equitable principles identified by the Supreme Court in *Sherrill* should not apply to this case, whether or not it could be technically classified as an action at law."[38]

After applying laches to the Cayugas' claim, and by extension, to the United States, the circuit court turned to the Cayugas' request for trespass damages.[39] In addition to their request for immediate possession of the land in question, the Cayugas also sought trespass damages in the amount of the fair rental value of the land for the entire period of their dispossession. Consistent with the logic of its initial analysis, the circuit court denied relief based on the Cayugas' inability to establish possession. The court stated, "inasmuch as plaintiffs' trespass claim is based on a violation of their constructive possession, it follows that plaintiffs' inability to secure relief on their ejectment claim alleging constructive possession" refutes the underpinnings of the trespass claim.[40] In other words, by barring plaintiffs' claim to possession through laches, the court found that they had no underlying basis for trespass. As noted by the dissent, a more accurate statement of this line of reasoning is that in barring the *relief* of ejectment, the circuit barred the *claim* of trespass. Thus, only through its characterization of the plaintiffs' action as a possessory land claim could the court avoid dispensation of damages.

Discussion

The Second Circuit's ruling in *Cayuga* raises several issues that were not adequately addressed in the court's analysis. This article will explore the Second Circuit's novel application of an equitable defense to an action at law. However, other issues remain unresolved. In barring the Cayugas' claim, the Second Circuit applied laches to the United States, a holding of questionable authority. Time, it has been said, can never run against the sovereign. The court's reliance on the Seventh Circuit's decision in *United States v. Administrative Enterprise*[41] may be misplaced. Moreover, the court radically expanded the scope of the Supreme Court's *City of Sherrill* ruling. Although these are substantial issues, the focus of this article is on the Second Circuit's use of laches to bar an action at law. The narrow issue considered is thus the Second Circuit's central holding, namely, that "[w]e understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations."[42]

Laches is an old doctrine, developed to remedy a unique problem in the evolution of a separate court system; namely, that statutes of limitations, while dispositive at law, were wholly inapplicable in equity.[43] As a substitute, laches operated in equity to bar stale claims when there had been inexcusable delay and prejudice to the party asserting the defense.[44] Implicit in these elements is the indication that laches, as an equitable matter, concerns itself with the fairness of allowing the claim to proceed, and not just the mere passage of time. Thus, laches may only be a partial defense, its bar rising only as high as the prejudice to the adverse party. Moreover, the focus of laches is on the remedy sought. The Second Circuit in this instance used laches to bar not only the remedy of ejectment, but also the Cayugas' underlying substantive right to possession. Furthermore, laches' intrinsic relationship to the statute of limitations should preclude its application in the instant case. In federal practice, laches may only be applied where equitable jurisdiction is "exclusive." That is to say, laches only applies where the sole remedy is in equity. Conversely, in *Cayuga*, no equitable remedies were sought, and thus, at the most, equitable jurisdiction was "concurrent."[45]

Likewise, the Second Circuit did not distinguish or account for the overwhelming amount of authority to the contrary. The Supreme Court in *Ewert v. Bluejacket*, held that Indian title could only be extinguished by an act of the sovereign.[46] Additionally, in more recent holdings in *Oneida II* and *City of Sherrill*, the Supreme Court has upheld *Ewert*, and expounded on its general holding. The Court recognized land claims based on dispossession of ancestral lands in *Oneida II*, but later held that equitable considerations could limit available relief in *City of Sherrill*. Nothing in these opinions—neither in their holdings or dicta—suggests that equitable defenses could operate to bar these legal claims. This proposition is widely dismissed by courts and commentators alike. The dissent in *Cayuga* aptly characterizes the majority's disposition of the case as "the application of a nonstatutory time limitation in an action for damages."[47] Although a statute of limitations debatably applies and thus controls, even absent such a statute the Second Circuit's ruling would nonetheless be flawed. Courts in every circuit have refused to apply laches within the statute of limitations and a few have extended this prohibition to any action at law.[48] Furthermore, with very few exceptions, nearly every state has prohibited laches at law.[49] Commentators as well have noted that "where a legal right is involved, and, upon the ground of equity jurisdiction, the courts have been called upon to sustain the legal right, the mere laches of a party . . . constitutes no defense."[50]

Additionally, in holding that an equitable defense may bar an action at law, the Second Circuit ignores the history and nature of equity that are essential to a proper application of its principles. The separate development of equity within the Chancery led to unique forms of pleading, procedure and relief. Equity, as a basis of jurisdiction, operates on assumptions entirely different from, and sometimes contradictory to, those of the law. However, equity developed to supplement the law, not to supplant it. As such, equitable maxims should generally be construed to favor the law, not to abrogate the rights created by it. Indeed, maxims such as "Equity follows the Law," "Equity will not suffer a wrong with-

out a remedy," and "Equity aids the vigilant, not the tardy," are intended to fulfill and complement the obligations of the law, not to impair or vitiate substantive rights. By extrapolating on these general principles, the errors and logical inconsistencies in the Second Circuit's ruling may be revealed. Thus, an understanding of the origins of equity is necessary to discern the purpose and proper place of equity in relation to the law.

I. The Chancery

The dichotomy of law and equity began in early thirteenth century England as a result of the economic and social realities of medieval Europe. Prior to establishment by Henry II of *Curia Regis*, the law was administered locally, often by judges lacking legal knowledge or training.[51] With the establishment of the Curia Regis, the law was administered nationally, through the king's court. The judges of the king's law court acted with all the power of the state and, in those early years of the common law, granted relief specifically and freely. In this period equity could fully be considered a tenet of the common law.[52] Only with the Provisions of Oxford in 1258 did equity and law emerge as separate guardians of the same temple. "The Provisions of Oxford . . . expressly forbade the chancellor to frame new writs without the consent of the king and Council. The great freedom which existed prior to this statute in the issuance of new writs, and the consequent flexibility in the law permitting a remedy in any case where justice required it, was extinguished by it."[53] Without the ability to issue new writs and fashion new relief, the common law became, in the following years, a rigid and hypertechnical system of pleading and procedure.[54] From this nexus, the creation and evolution of an equitable jurisprudence seemed inevitable. The common law had begun as the power of the king to do justice in all cases. One had to petition the king for redress; it was not a natural right. Thus, when the common law became formalized and specific relief no longer available, deficient pleadings were widespread and inadequate remedies the rule rather than the exception. It was natural then, that the people would again turn to the king for a redress of grievances.

In order to transact the regular business of the state, the king would assemble the numerous officers of state and his other advisors to attend a session of his court, as the Council. The Council was an executive body that had many judicial powers and duties because of its close relationship with the king. In this position, "the Council tried important cases involving the king or between great men, or involving the special prerogative power in the king to give relief where relief could not be had through the regular courts."[55] At the head of the Council was the chancellor, who may best be analogized as a prime minister or secretary of state. In addition, the chancellor was often an ecclesiastic who heard the king's confessions. The chancellor represented the king's conscience and as such, had inherent powers to remedy any situation to the degree that the king's conception of justice required. At the beginning of the fourteenth century, the chancellor, through the Chancery, began to exercise jurisdiction over common law cases that involved rights of or against the king.[56] The Court of Chancery, as representative of the king's conscience, had extraordinary powers to fashion remedies for any specific wrong. Thus, those who could ill afford the price of the law courts, or whose pleading was not recognized by the hypertechnical forms of the common law, inevitably turned to the conscience and prerogative of the king to do justice. "The chancellor was the most powerful personage in the government, next to the king, and it was natural that he should be used to bring such malefactors to terms, rather than the judges of the common law, whose system of justice had broken down, making these petitions to king and Council necessary."[57]

By the early sixteenth century, the Chancery had developed into a distinct court, with inherent authority to do justice as equity required. As Walsh describes it, "equity[,] as administered by this court, had grown to be a great system of law, outside of the common law, competing with it in many ways, many of its doctrines and rules supplanting the common law, and many more in direct opposition to it."[58] This conflict grew as the Chancery steadily increased its jurisdiction over cases and overturned findings of the courts of law. More so, the existence of powerful factions within the king's court often impeded the execution of justice. Influential men could run roughshod over the orders of the ordinary courts because they existed in a paramilitary fashion that need only answer to the king. Thus, "appeals for justice to the king through the chancellor were in many cases rendered necessary by the inability of the king's ordinary courts of common law to compel obedience from the more wealthy and powerful of the king's subjects in cases where the complainant was relatively poor."[59] This ability of the Chancery to act *in personam*[60] led to a gradual shift in preference of the Chancery over the common law courts. Thus, "with growing frequency, the courts of equity were encroaching on the traditional powers of the courts of the common law."[61] This conflict culminated in the famous dispute between Chief Justice Coke of the King's Bench and the Lord Chancellor Ellesmere.

The issue in *Coke v. Ellesmere* was, very fundamentally, the power of the Chancery to enter an order opposing the determination of the common law courts. The Chancellor Ellesmere had issued an injunction prohibiting a plaintiff from executing his judgment at law. The common law judges argued that the Statute of Praemunire, which prevented any attack on the judgment of the king's court, nullified any action taken by

the Chancery to interfere with its judgment.[62] The dispute was referred to the king, who, along with an advisory body, held for the chancellor. Theoretically, there was no conflict; since equity acted *in personam* and not *in rem*, the injunction issued by the Chancery left the law judgment intact. Practically, however, a party wishing to assert his rights at law faced the possibility of contempt from the Chancery. The consequences of contempt of the Chancery must have greatly dissuaded a party from enforcing his rights at law. Another practical consequence was the decline of the power of the Chancery. Through the Statute of Uses, common law recognition was given to uses, thus making appeals to the Chancery unnecessary. Additionally, equity began to place greater significance on the inadequacy of relief at law as a prerequisite to the exercise of equitable powers. This condition precedent to equitable relief emphasized the extraordinary remedial power of specific relief. In fact, though the conflict is famous, it is not inaccurate to say that no conflict truly existed. Equity developed, in theory and in practice, to supplement the common law. Some scholars point out that "equity developed to give relief, through its power [to act] *in personam*, in cases where adequate relief could not be had at law in the form of damages enforced *in rem* only; that no equitable title or ownership can exist except as fictions, as the trustee has the legal title, therefore the *cestui que trust* has only a right *in personam* against the trustee,[63] that equity intervenes not in opposition to legal rules, but only to supplement the law so that legal rights existing under those rules may be more completely or adequately protected."[64] Nevertheless, the validation of the Chancery through the result in *Coke* allowed equity to fully develop as a complete jurisprudence that was similar to the common law in structure, yet fundamentally different in substance.

II. Merger

The development of equity outside the system of common law resulted in two separate systems of justice, each with its own distinct courts and rules of pleading and practice. The practical consequence of this was that suits could not be transferred from law to equity or equity to law. "Therefore, a party seeking relief in the wrong court had to start all over again."[65] By the mid-nineteenth century the reasons that had led to a separate court of equity had disappeared, making the merger of the courts seemingly inevitable. New York was the first state to reform, with adoption of the Code of Procedure, now generally known as the Old Code.[66] The reforms that this statute purported to achieve were (1) "The consolidation or merger of procedure at law and in equity, . . . without difference in action or procedure . . . except as differences in procedure necessarily continued in enforcing different forms of relief. (2) The substitution of a single action, the 'civil action,' for all the different forms of action then existing at law and in equity [and] (3) [t]he abolishment of the technical rules of pleading and practice at common law so far as they differed from the rules of pleading and practice in equity."[67] The effect of merger was to bring law and equity together in their actual practice and enforcement. However, merger "[made] no change in the substantive rules of the common law or equity, nor [did] it change the character and quality of the relief given."[68] This is quite obvious from the continued practice to present of characterizing an action at law or in equity. Under the merger the "relief granted also continue[d] to be legal or equitable, but legal and equitable relief [were now] given in the same action."[69] Importantly, especially in the present context, the doctrines and defenses of each system remained intact. Thus, legal rights and equitable rights remain distinct, and the same facts must be pleaded and proved to get relief, whether legal or equitable. This is particularly important in determining the availability of a jury trial, which was historically reserved for actions at law. In sum, merger consolidated the procedural but not substantive elements of law and equity. Some previously equitable defense such as estoppel and waiver came into the law, but many parts of the system remain distinct. Additionally, though merger is important historically, it does not affect the rights, defenses or remedies to a significant extent in the *Cayuga* case. Merger and the separate systems of pleadings are typically important to determine the availability of a jury trial, but not much more. In the instant case, laches had not historically been available at law, and the Cayugas' claims only involve legal rights. The preservation of these distinctions is critical to the issues before the court in the *Cayuga* case. Merger, in this sense, is important for what was excluded; namely the separate substantive doctrines and defenses of each respective area.

III. Laches

The doctrine of laches was developed by the chancellors of equity to prevent the assertion of stale claims and to remedy an injustice that sometimes arose from the existence of the separate system of equity: when an equitable remedy was sought, the statute of limitations that ordinarily would apply to a legal right was inapplicable. The courts, in the interests of fairness, devised the doctrine of laches to prevent a party from recovering when he or she has slept on his or her rights. Lord Camden set out this general principle in *Smith v. Clay* when he stated, "A court of equity . . . has always refused to lend its aid to stale demands, where a party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing."[70] However, delay in itself is not a bar to recovery; the doctrine of laches requires fulfillment of a twofold test: First, inaction or a lack of dili-

gence by the party against whom the defense is asserted, and second, prejudice to the party asserting the defense. Therefore, although laches is quite rightly analogized in law as a statute of limitations, the applicability of either to an action is largely dependent upon whether the action is at law or equity, and other attendant circumstances.[71] The relationship between the legal defense of the statute of limitations and the equitable defense of laches is discussed at length in *Shell v. Strong*:

> A court of equity is not bound by the statute of limitations, but, in absence of extraordinary circumstances, it will usually grant or withhold relief in analogy to the statute of limitations relating to actions at law of like character. Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the analogous statute, a court of equity will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show . . . that extraordinary circumstances exist which require the application of laches.[72]

Moreover, the rationale behind the defense of laches is more subtle and intricate than that of the statute of limitations.[73] Laches, as an equitable defense, is limited by the particulars of the remedy sought. Of primary concern is the notion that laches is based on prejudice to the party asserting it. According to Dobbs, the reasoning behind this is laches' close association with the equitable maxim that equity aids the vigilant not the tardy. At the heart of this maxim is fault on the part of the plaintiff. Dobbs, however, believes that "the plaintiff's fault, if any, is indeed relevant, but not perhaps because equity should punish him. Rather it is that if delay has prejudiced the defendant, the plaintiff may fairly be asked to bear the responsibility for that prejudice, but not otherwise."[74] As Dobbs emphasizes, laches generally bars recovery only so far as the party was prejudiced. For example, in a patent infringement case, the holder of a patent may pray for an injunction from future use and damages for the misappropriation of the patent. If the patent holder has unreasonably delayed his action, so that the infringers relied on his acquiescence, laches will bar damages for infringement. It will not, however, operate to sanction any future infringements, and thus cannot bar the injunction for lack of prejudice to the infringers. Therefore, the nature of the remedy sought will necessarily affect the court's analysis. For "laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced."[75] It follows logically that laches pertains only to the remedy sought, not the cause of action itself.

In the *Cayuga* case, the Second Circuit inappropriately applied laches to bar both the Cayugas' claim and the relief they sought. These issues will be addressed *infra*, in their relation to the equitable maxim upon which laches is based. The present issue is the procedural error by which the Second Circuit even entertained a claim of laches. The Cayugas, in seeking restoration and possession of their ancestral lands, based their action the Nonintercourse Act. However, in 1982, Congress amended 28 U.S.C. § 2145 to set out a mechanism with the Secretary of Interior for the filing of Indian land claim litigation. This statute states "except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues,"[76] in accordance with subsection (g), which provides that "any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act."[77] This Act, as amended to provide for the Indian Claims Limitation Act, was enacted on December 30, 1982. Therefore, for purposes of this litigation, the Cayugas filed a complaint nearly two years *before* their claim began to accrue, and nearly eight years *before* the expiration of the statute of limitations.[78]

Furthermore, a prior district court found that the actions were timely, in light of Second Circuit precedent which held that "claims brought by Indian tribes in general, including the plaintiffs herein, should be held by the courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if the same had been brought by the United States."[79] Nonetheless, as discussed above, a court sitting in equity is not bound by the statute of limitations, but by the prejudice to the defendant. The fatal flaw of this argument is that the Second Circuit was not sitting in equity—the very claim stated, with all commensurate relief, was at law. Even if the Circuit, due to equitable considerations, had to limit the relief of the Cayugas, the characterization of the action would still be one at law. Therefore, as the statute did not require the plaintiffs' sole remedy to be in equity, equitable jurisdiction was concurrent and not exclusive. Accordingly, the Sec-

ond Circuit should have never reached laches; the concurrent nature of jurisdiction required the statute of limitations to be applied.[80] Although this constitutes reversible error, this technicality does not reach the substantive errors of the Second Circuit. Consequently, a close examination of equitable principles should reveal the errors in the court's logic.

IV. Equitable Maxims

As a fully functioning system of laws by the seventeenth century, equity was not prepared or equipped to entirely fulfill its duties and obligations as the king's conscience. John Selden, a seventeenth century jurist, famously remarked that equity varied with the length of the chancellor's foot.[81] His quip illustrates the lack of precedent in equitable jurisprudence. Whereas the common law is bound by prior decisions, thereby adjudicating disputes through analogy to similar circumstance, the chancellors had wide discretion to settle disputes in any way that justice required. In order to aid chancellors, and in an attempt to pursue uniformity, twelve equitable maxims were developed *lex non scripta* to encompass the principles of equitable jurisprudence.[82] These maxims are general guidelines; a court must begin with them and may not rule to conflict with them, but the court has wide discretion otherwise. There are three equitable maxims (Equity will not suffer a wrong without a remedy, Equity follows the law, and Equity aids the vigilant and not the tardy) that are of particular significance in the *Cayuga* case, that the Second Circuit either contradicted or misapplied. A brief analysis of these maxims will demonstrate the Second Circuit's misinterpretation of these principles and the inequitable, and thus unjust, result that followed.

A. Equity Will Not Suffer a Wrong Without a Remedy

This maxim does not refer to a moral or ethical wrong, rather to a legal or equitable wrong. It refers to the idea that a court sitting in equity has inherent power to grant relief freely and specifically. The plain words of the maxim suggest the remedial nature of equity. This underscores the extraordinary powers the chancellor traditionally held to form a remedy as justice required. Additionally, this maxim reflects the historical realities of equity's development. Equity primarily evolved as a supplement to the common law; as a way to correct deficiencies when the law failed to remedy at all, or where the remedy was insufficient, impractical, or unfair. To illustrate, this excerpt from James and Hazard should demonstrate the historical significance of this maxim:

> A typical situation [ ] was presented by an action at law on a specialty (e.g. bond under seal) which had been obtained from the defendant by "fraud in the inducement," such as misrepresentation concerning the value or quality of something sold by plaintiff to defendant on credit where the bond in a large penal sum was given to secure payment of the purchase price. If the defendant had indeed executed the bond, knowing it was a bond, then the kind of fraud by which he was induced to execute it was not recognized in the law courts as a defense to an action on the bond. Equity, however, did recognize this kind of fraud and would entertain a suit by the debtor against the creditor (obligee on the bond) for a rescission of the bond. If the debtor succeeded in showing the fraud the chancellor would order the obligee to deliver the bond up for cancellation or to give a release of it under seal, on condition that the debtor restore to the creditor whatever benefit he had received in the course of the transaction.[83]

Once again, the remedial nature of equity is emphasized as the foremost purpose and direction of equitable jurisprudence. Thus, if a party asserts a viable right, a court in equity will focus not on the underlying substance of the claim, but rather on the consequences flowing from such an assertion. Therefore, this maxim demonstrates that equity implicitly recognizes the validity of a judgment at law, but will intervene to recompense the injured party. In this way equity fulfills the obligations of the law.

In the *Cayuga* case, the Second Circuit apparently ignored this maxim to achieve a result it desired. The Supreme Court in *Oneida II* established that Native American tribes had a cognizable legal claim to their ancestral land that had been acquired in violation of the Indian Trade and Intercourse Act (Nonintercourse Act) and the 1794 Treaty of Canandaigua. Importantly, the Nonintercourse Act remains good law and the Treaty of Canandaigua has never been rescinded. Accordingly, as a party to the 1794 Treaty of Canandaigua, the ruling in *Oneida II* conferred upon the Cayugas a viable legal claim for possession of their ancestral lands. Therefore, the Cayugas' claim asserted a legal right that they attempted to enforce through the remedies of ejectment, declaratory relief, an accounting, and trespass damages for the fair rental value of the land.[84] As their action was one at law, the tribe naturally sought relief at law. However, the district court, "after considering the interests to be protected, the relative adequacy of various remedies, delay, misconduct, and relative hardship, the interests of third parties, and the practicability of an injunction,[85] [ ] granted the defendants' motion to preclude ejectment as a remedy."[86] In other words, due to

the impracticality, and unfairness of the legal remedy of ejectment, the district court found that equitable considerations barred ejectment. The insufficiency of the legal relief, however, did not bar the Cayugas' underlying claim. Therefore, the Second Circuit was incorrect, as a matter of principle, when it held that equitable considerations (primarily the defense of laches) barred the Cayugas' possessory land claim.

The Cayugas primarily sought relief through the theories of ejectment and trespass. As the dissent in *Cayuga* notes, "an action for ejectment generally seeks two remedies, restoration of possession and damages equivalent to the fair market value for the period the plaintiff was wrongfully out of possession. . . . Reinstatement of one's possessory interest in land is typically the [more] salient of the two remedies. It is hardly surprising, therefore, that some jurisdictions have chosen to make the doctrine of laches available to defendants in ejectment actions where a coercive remedy is sought."[87] Thus, given the impracticality of the coercive remedy of ejectment, the Second Circuit rightfully precluded that relief. However, damages for fair market value remain a remedy that is neither impractical, insufficient nor unfair. Indeed, as the Cayugas are possessors of a legal right to the land, equity demands what amounts to satisfaction of a legal debt. The Second Circuit, in holding that the coercive element of ejectment was barred, erroneously concluded that the Cayugas, having been denied the right to possession, could not prove the elements of their money claim for damages. However, an action for ejectment does not require current possession, it instead consists of the following elements: "plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the wrongful possession."[88] As the dissent noted, "[m]aking out this claim cannot depend on the plaintiffs' ability to obtain the right to *future* possession, whether legal or constructive, as such requirement would make the claim circular."[89] Thus, the wrong of dispossession does not require the drastic coercive remedy of ejectment; indeed equitable considerations may bar such a remedy. However, the wrong remains, and equity, in its power, must remedy the insufficiency of the law. Therefore, to completely preclude relief as the Second Circuit has done leads to an inequitable result.

The Cayugas' prayer for relief through trespass was similarly precluded by the Second Circuit. The majority reasoned that the Cayugas could not maintain an action for trespass because they had not proven the underlying right to possession. The right to possession was conferred to the Cayugas by the Supreme Court in *Oneida II*. The Second Circuit's dismissal of this claim as derivative of the tribe's prayer for ejectment is another conflation of principles. The claim for trespass involves the *right* to possession, which indisputably rests with the Cayugas. As demonstrated above, the plaintiffs may be able to prove the *right* to possession, but fail to obtain a *coercive remedy* that would restore them to possession. Therefore, the impracticality of granting relief through possession does not necessitate dismissal of the plaintiffs' claim in trespass. As the dissent states:

> The majority's contention that the plaintiffs cannot make out their claim for damages because their claim for coercive relief fails treats the special defense of laches as if it were in the nature of a statute of repose. . . . However, the defense of laches does not apply to prevent a party from establishing an element of its cause of action. Perhaps if laches were a doctrine akin to a statute of repose,[90] such that, first, it applied to a legal claim and, second, it vitiated the claim, the majority's analysis that claims involving the right to possess are barred by laches because laches barred the remedy might be persuasive.[91]

Therefore, by using equitable considerations to sanction rather than remedy an insufficiency at law, the Second Circuit abused the power of equity to preclude a right that was in need of a remedy.

B. Equity Follows the Law

Perhaps no other principle is as applicable to the instant case, as the maxim Equity follows the law. As the maxim concisely states, equity is intended to supplement, not supplant the law. The nature of equity precludes an equitable doctrine from usurping the force of a legal claim, defense, or doctrine. Certainly many equitable and legal doctrines such as estoppel and waiver apply with equal force in equity and at law; yet the fundamental divide of the historic separation remains. Furthermore, it is abhorrent to equitable principles that an equitable defense should be used to defeat a legal claim. To emphasize emphatically: equity *follows* the law. Equity may intervene to bar some specified relief to a stale legal claim, but it can in no way extinguish that right. Pomeroy stated this principle succinctly in *Equity Jurisprudence*: "a court of equity follows and is bound by the rules of law, and does not use equitable considerations to deprive a party of his rights at law."[92] The great weight of authority sides with this proposition, and for good reason; equity imbues an arbitrator with near ecclesiastical discretion, similar to that power of the chancellor, a man second only to the king. The common law, by contrast, follows rigid rules of construction, adjudicates by analogy and is inherently *ad seriatim*. In this way, the law is predictable, universal, and knowable by all; hence the common law. The powers of equity are extraordinary, and in many ways supe-

rior to the common law; therefore, in order to constrain such power, it is necessary for equity to accede to the law.

Perhaps the best summary of these concepts can be found in *Bauer v. P.A. Cutri Co.*, an action by a seller of an insurance agency against a sub-purchaser, to declare a covenant not to compete void and for sum due on the original sale. As it does not relate whatsoever to the *Cayuga* case, it seems an inherently reasonable place to start. The court in *Bauer* held:

> It is clear from the outset that the appellee's claim for money damages is one normally cognizable at law. Of course since appellee asked to have the covenant-not-to-compete declared null and void, this action was properly in equity. . . . This does not mean, however, that appellant can use equitable defenses to defeat appellee's legal claim for money damages. These equitable defenses are designed only to prevent an "undeserving" plaintiff from obtaining by an appeal to the chancellor's "conscience" the kind of *extraordinary* remedies available in equity, but they in no way prejudice his rights at law.[93]

Similarly, in *First Citizens National Bank v. MacAllister*, the Supreme Court of New Hampshire held that "laches is a doctrine peculiarly applicable to suits in equity. . . . Where only strictly legal rights are in controversy no neglect in asserting the right, short of the time prescribed by the statute of limitations, will bar the appropriate legal remedy."[94] Indeed, even under Second Circuit precedent, "while it is hornbook law that the availability of effective legal relief will bar an equitable claim, few would suggest that available equitable relief will bar a legal claim."[95] The implicit line of reasoning followed in these cases is that equity follows the law. Thus in *Bauer*, the court emphasized that equitable considerations could in no way prejudice the party's rights at law. Similarly, in *MacAllister*, New Hampshire determined that in the context of laches, equity will not interfere with legal rights.

Commentators have described this maxim in less illustrious terms, as a vague and often misleading expression. Henry McClintock believes that the maxim that equity follows the law "is disregarded much more frequently than it is applied; necessarily so, since equity is a system for the correction of defects in the law."[96] Fred Lawrence notes that the maxim is "somewhat indiscriminately used to convey two distinct meanings: (1) the notion of limitation, that courts of equitable jurisdiction have no arbitrary discretion to disregard legal principles; (2) that legal principles will be followed in the enforcement of legal rights or analogous equitable rights."[97] Although this maxim is inherently vague and possibly contradictory, it may be said to stand for the proposition that where legal and equitable rights are defined and enforceable, equity will not operate to subrogate or otherwise abridge them. For example, "equitable titles are subject to the same laws of inheritance as legal estates, and their devolution is the same. And so, as at common law, the husband was entitled absolutely to his wife's chattels in possession, he is in like manner considered entitled to chattels of which she is the equitable owner."[98] Similarly, implicit in these remarks is the notion that equity does not reach a legal right. In other words, equity must follow the law because a claim at law is of right, not privilege—its exercise is inherent in subject or citizenship. Thus, the true import of the maxim may be: where rights are established, or claims vindicated, equity will not operate to extinguish such right.

C. *Vigilantibus Non Dormientibus Æquitas Subveniunt*[99]

Despite the pretentious title, this maxim is inextricably enmeshed with the concept of laches. In fact, it incorporates the elements of laches and is thus the foundation for the doctrine. It is based on the general principle that one that has acquiesced in an assertion of rights adverse to his cannot claim the protection of the courts when he has caused reliance upon his inaction. Bispham defends the maxim as such: "this defence is peculiar to chancery courts, which in such cases act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."[100] The interesting particular of this maxim, as with laches in general, is its limited applicability. Laches will only bar a remedy to the extent the party it is asserted against has been prejudiced. In this manner, this maxim is more misleading than any other, "for equity does not impute laches to a party for delay alone, but only for delay which is unreasonable under the circumstances and which has resulted in harm to the other party."[101] Moreover, laches may be denied for excusable ignorance and against public officials. To be sure, laches is a very limited doctrine, which unlike other equitable doctrines, is limited further by the merger of law and equity.

Courts and commentators generally agree that laches is not a defense to an action at law. McClintock asserts that "the defense of laches was a purely equitable defense which was not recognized in courts of law." He further advises to restrict laches to equitable issues, lest the substantive rights of the parties be jeopardized "by creating a defense which could not in any manner have previously been asserted against that action."[102] Indeed, Robert Thompson notes sparsely (as

if there were no other conclusions) that "laches is an equitable defense. It therefore does not bar a legal remedy." The eminent John Pomeroy concluded that "where a legal right is involved, and, upon the ground of equity jurisdiction, the courts have been called upon to sustain the legal right, the mere laches of a party . . . constitutes no defense."[103] And so *ad infinitum*, commentators have been loath to acknowledge a defense of laches as an action at law.

The applicability of the equitable defense of laches to an action at law is admittedly an arcane subject, so courts do not often have occasion to visit the subject. However, the Supreme Court addressed the topic in *United States v. Mack*, where Justice Cardozo, speaking for the Court, concluded that "laches within the term of the statute of limitations is no defense at law."[104] However, the decision in *Mack* predates the merger of law and equity in the federal courts under the Federal Rules of Civil Procedure. Although the Court has not definitively addressed the subject since merger, it quoted this passage with approval in *McAllister v. Magnolia Petroleum Co*.[105] Additionally, and perhaps most interestingly, the Court's last comments on the subject were in *Oneida II*, where the Court stated *in dicta* that "application of the equitable defense of laches in an action at law would be novel indeed."[106] In *Ashley v. Boyle's Famous Corned Beef Co.*, the Eighth Circuit reversed a district court's finding that laches barred the plaintiff's EEOC claim that was filed under the applicable statute of limitations.

The court determined that "separation of powers principles dictate that federal courts not apply laches to bar a federal statutory claim that is timely filed under an express federal statute of limitations."[107] The court also held:

> We noted the general principle in *Sandobal v. Armour & Co.*, 429 F.2d 249, 256 (8th Cir. 1970) (laches "is rarely, if ever, invoked as a bar to an action at law seeking damages for breach of contract"), and our sister circuits have repeatedly stated that laches is unavailable to bar claims for legal relief governed by a statute of limitations. See, e.g., *FDIC v. Fuller*, 994 F.2d 223, 224 (5th Cir. 1993) (Texas law); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 586 (9th Cir. 1993) (ADEA claims), cert. denied, 114 S. Ct. 1049 (1994); *United States v. RePass,* 688 F.2d 154, 158 (2d Cir. 1982) (False Claims Act); *Nilsen v. Moss Point*, 674 F.2d 379, 388 (5th Cir. 1982) ("although the equitable part of a mixed [§ 1983] claim can be barred by laches, the legal part will be barred only by the statute of limitations"), vacated on other grounds, 701 F.2d 556 (5th Cir. 1983); *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817, 822 (6th Cir. 1981) (Ohio law); *Sun Oil Co. v. Fleming*, 469 F.2d 211, 213-14 (10th Cir. 1972) (Oklahoma law); *Morgan v. Koch*, 419 F.2d 993, 996 (7th Cir. 1969) (Rule 10b-5 claim); *Straley v. Universal Uranium & Milling Corp.*, 289 F.2d 370, 373 (9th Cir. 1961) (Securities Act of 1933 claim).[108]

Even this summary disposition of cases demonstrates that the rule is widespread, with very few, if any exceptions. Thus, to persist along this line, although demonstrative, distracts and is uninformative.

A review of a small sampling of state court decisions indicates the same trend. In Oklahoma, *Van Antwerp v. Schultz* held that "[t]he doctrine of laches does not apply to cases not of equitable cognizance, and . . . laches [is] not a defense to an action at law."[109] Notably, New York has disposed of this issue succinctly in *M. Lowenstein & Sons v. Austin*, where the court stated "the answer[,] short and simple, is that laches is a defense only to actions in equity, and is not a defense to an action at law."[110] So too, Connecticut has recently declared that "[t]he equitable doctrine of laches is an affirmative defense that serves as a bar to a claim for equitable relief. Laches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law within the statutory period. It is an equitable defense allowed at the discretion of the trial court in cases brought in equity."[111] In Alaska, the rule is, "laches is inapplicable to an action at law. . . . When a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of the right."[112] Georgia has provided that "the equitable doctrine of laches is not applicable to suits at law."[113] Similarly, Arkansas holds "[t]he doctrine of laches has no application where the plaintiffs are not seeking equitable relief."[114] Suffice to say, research yielded only two jurisdictions, Illinois and Michigan, which allow laches in actions at law. The scope and applicability of laches in these instances is not dispositive of the instant case, so it need not be considered. The undeniable proposition is that laches, as an equitable defense, is not recognized at law.

These decisions cut across a large geographic and political swath and demonstrate the degree of error in the Second Circuit's logic. Nearly every state, nearly every jurisdiction has found the divide between law and equity too expansive for laches to cross. Although

the language of the federal courts may leave open the possibility that laches would apply to a legal claim in a non-statutory time period, it seems unlikely that this is a distinction the courts would be willing to make. Moreover, the states have not qualified their assertions in any way. The unequivocal consensus, as New York states it, is that "laches is a defense only to actions in equity, and is not a defense to an action at law."[115] Thus, although the majority points to several decisions that apply laches to bar ejectment, they fundamentally confuse the issue. Those decisions do allow laches, in very limited circumstances, to bar the remedy of ejectment; they in no way, however, allow laches to operate as a bar to a legal claim.

Inexplicably, both the district and the circuit courts regarded this case as lacking a controlling statute of limitations. Though it seems clear that 28 U.S.C. § 2415(b) would operate as a statute of limitations, perhaps because the action originated with the tribe and not the United States, it was inapplicable.[116] To the extent that this discussion focuses on what appears to be a statute of limitations, it is not dispositive. However, this seems to be a minor, and quite frankly, technical issue. Though it is true that the existence of such a statute of limitations would constitute reversible error, the court (or I) may be forgiven for such an error. Conversely, the court cannot be excused for the errors in substantive logic. Its line of reasoning ignores the distinction between a right and a remedy and, in doing so, deprives the Cayugas of their right to possession of ancestral lands. Through the paradigm of equitable maxims, it becomes increasingly clear that the Second Circuit should not have applied laches to an action at law.

V. *Ewert v. Bluejacket*

There is one last countervailing consideration that the Second Circuit failed to weigh in applying laches to the Cayugas' claims. In *Ewert v. Bluejacket*, the Supreme Court declared void a deed conveyed to Paul Ewert, a Special Assistant to the Attorney General, by the widow of Charles Bluejacket, a full-blooded Quapaw Indian. The transaction violated the terms of Revised Statutes § 2078 which reads: "No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States."[117] The district court determined that Ewert was outside of the statute, as he was only employed to assist in the allotment of Indian land, not generally in the Office of Indian Affairs. The circuit court reversed that determination, but found the heirs of Bluejacket guilty of laches. In reversing, the Supreme Court determined that Ewert was within the statute's reach and that "the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."[118] Recognizing that the statutory restraint on alienation of Indian land adopted by the Nonintercourse Act was still good law, the Court in this case reasoned that it would require an act of sovereignty to extinguish an Indian title.

The Court subsequently reaffirmed this view in *United States v. Candelaria*,[119] and more recently in *Oneida I*.[120] Hence, given that a court may not execute a sovereign act, it follows that the judicially created doctrine of laches cannot extinguish an Indian title. Additionally, in light of the statutory restraints on alienation of Indian land, it seems inappropriate to apply laches to bar further claims to title. This would result in judicial abrogation of a valid congressional act. Thus, separation of powers principles would dictate that where Congress has conferred a right to title (such as in the Nonintercourse Act) the courts are precluded from annulling that right. Moreover, the Court held in *Oneida II* that, "congressional intent to extinguish title must be 'plain and unambiguous,' and will not 'lightly implied.'"[121] Lastly, as with the borrowing of state statute of limitations in the context of Indian land claim litigation, the use of laches appears to be inconsistent with established federal policy.

The United States acts as a guardian to these dependent nations; Congress has provided mechanisms to further protect their land and customs. In its capacity as a trustee, the United States and its courts must be vigilant in advancing Indian land rights. In failing to do so, the Second Circuit conflated legal principles, used a remedy to bar a right, advanced an untenable equitable defense, and ignored the substantial weight of precedent that favored the Cayugas.[122]

Endnotes

1. 413 F.3d 266 (2d Cir. 2005).
2. Henry Lacey McClintock, McClintock on Equity, § 28 at 71 (2d ed. 1948) [hereinafter McClintock].
3. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 664 (1974) [hereinafter *Oneida I*].
4. *Id.* at 664.
5. *Id* at 663-65.
6. *Id.* at 669 (citations omitted).
7. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985) [hereinafter *Oneida II*]. In addition to the Oneida Indian Nation of New York, plaintiffs included the Oneida Tribe of Wisconsin and the Oneida of the Thames Band Council Tribe. Each of these tribes could trace their lineage to the Oneidas of New York.
8. *Id.* at 232-33.
9. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S. Ct. 1478, 1482-83 (2005).
10. *City of Sherrill*, 125 S. Ct. at 1488.

11. *Id.* at 1483.
12. *Id.* at 1492-93.
13. *Id.* at 1492.
14. *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973), *quoting Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926).
15. *City of Sherrill*, 125 S. Ct. at 1493 (citation omitted).
16. *Id.* at 1490 (citation omitted).
17. *Id.* at 1492-93.
18. *Id.* at 1493.
19. *Id.*
20. *Id.* at 1492, *quoting Galliher v. Cadwell*, 145 U.S. 368, 373 (1892).
21. *Oneida II*, 470 U.S. at 253 n.27.
22. Dan Dobbs, Law of Remedies § 1.2 (2d ed. 1993).
23. *City of Sherrill*, 125 S. Ct. at 1488, *quoting Oneida Indian Nation of New York*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000).
24. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-69 (2d Cir. 2005).
25. *Id.* at 269.
26. *Id.* at 270-71.
27. *Id.* at 273.
28. *Id.* at 274.
29. *Id.*
30. *Id.* The equitable defenses referred to were Laches, Acquiescence and Impossibility, which the Court invoked to bar the claims in *Sherrill*.
31. *Id.* at 275.
32. *Id.* at 274.
33. *Id.* at 275, *quoting Cayuga X*, 1999 U.S. Dist. LEXIS 10579, *97.
34. It warrants mention that the first logical flaw in the majority's argument is this unsound assumption. The court here conflates the basic distinction between a *remedy* and a *right*.
35. *Id.*, *quoting City of Sherrill*, 125 S. Ct. at 1494 n.14.
36. *Id.* at 276 n.5. However, the court overlooks the fact that these cases barred the coercive remedy of ejectment and in no way barred the underlying substantive claim.
37. *Id.* Indian lands are subject to a variety of special rules; among those cited by the circuit court as relevant to this action are the decision in *Oneida II* (which found that the general law favoring the borrowing of state law limitations periods did not apply to federal Indian land claims) and the holding of *Mohegan Tribe v. Connecticut* (which found that adverse possession does not run against Indian land). As the dissent notes, these rules indicate that Indian land claims are entitled to more protection, not less, as a result of strong federal policy protecting tribal title from application of state law. *See Cayuga*, 413 F.3d at 283.
38. *Id.*
39. *Id.* at 278.
40. *Id.*
41. *Id.* at 278-79.
42. *Id.* at 273.
43. McClintock, *supra* note 2, § 28 at 74.
44. *Id.* § 28 at 71.
45. Distinction discussed *infra*, pt. II.
46. *Ewert v. Bluejacket*, 259 U.S. 129 (1922).
47. *Cayuga*, 413 F.3d at 282-83.
48. Notably, the Second Circuit in *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257 (2d Cir. 1997).
49. See discussion, *infra*.
50. John Norton Pomeroy, 2 A Treatise on Equity Jurisprudence, § 419(e) at 180 (5th ed., 1941).
51. William Walsh, A Treatise on Equity, § 2 at 4 (1930).
52. In fact, the Chancellor, upon whom it fell to create equitable jurisprudence, was in these early years the secretary of the king's court, with the Chancery as the secretariat. One would petition the chancellor for a writ to present a case in the courts of law.
53. Walsh, *supra* note 51, § 2 at 8.
54. McClintock, *supra* note 2, § 2 at 4.
55. Walsh, *supra* note 51, § 3 at 14.
56. *Id.* § 5 at 28.
57. *Id.* § 3 at 17.
58. *Id.* § 4 at 27.
59. Robert Leavell, et al., Equitable Remedies and Restitution 3 (3d ed., 1980).
60. Robert Leavell contends that the idea that equity acts in personam (a venerated, though archaic equitable maxim) derives from the differing procedures of the common law courts and the Chancery. The writ that was required to appear before the ordinary courts was the legal authorization of the king for the court to hear the particular dispute between the parties and no other case. Thus, judgment by the common law courts did not order the defendant to act, but merely allowed the plaintiff to recover under the authority of the king. Conversely, the writ issued by the Chancery was in the name of the king; that is, the writ was a direct command of the king to his subject to do or to refrain from doing certain things. Thus, if a defendant disobeyed the order he was in contempt not of the chancellor but of the king, and was dealt with accordingly. *Id.* at 4.
61. *Id.*
62. *Id.* at 5.
63. "A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee." Walsh, *supra* note 51, § 5 at 30 (quoting Langdell Robert, Summary of Equity Pleading 210, 211 (2d ed.)).
64. Walsh, *supra* note 51, § 5 at 29-30. Additionally, the "relation (of law and equity) was not one of conflict. Equity had come not to destroy the law, but to fulfill it. Every jot and every title of the law was to be obeyed…." Walsh, *supra* note 51, § 5 at 30 (quoting Maitland, Lectures on Equity 18). Thus, as Professor Maitland observes, the principles of equity are grounded in a deep respect for rights at law, only supplementing relief as was necessary for justice.
65. *Id.* § 7 at 36.
66. *Id.*
67. *Id.* § 7 at 37.
68. *Id.*
69. *Id.* § 7 at 38.
70. *Piatt v. Vattier*, 34 U.S. 405, 416 (1835), *quoting Smith v. Clay*, 3 Browns Ch. Rep. 640 (1767).
71. Furthermore, "[i]n the federal courts, the statute of limitations yields to the doctrine of laches only in cases in which equitable jurisdiction is 'exclusive' and not 'concurrent.' . . . If the sole remedy is not in equity and an action at law can be brought on the same facts, the remedies are concurrent for purposes of the rule under consideration even though more effective relief would be available in equity." *Nemkov v. O'Hara Chicago Corp.*,

592 F.2d 351, 354-55 (7th Cir. 1979). In other words, the inquiry is not whether a plaintiff could obtain the same relief at law; rather it is whether the statute relied on requires the plaintiff to seek relief only in equity.

72. *Shell v. Strong*, 151 F.2d 909, 911 (10th Cir. 1945).

73. Despite the marked differences between the doctrine of laches and a statute of limitations, it is important to note that they are similar insofar as they both bar *relief*. Both limit the remedial options of the party against whom it has been asserted, but in no way extinguish the right upon which the claim is based.

74. Dobbs, *supra* note 22, § 2.4(4) at 76.

75. *Cayuga*, 413 F.3d at 284, *quoting Galliher v. Cadwell*, 145 U.S. 368, 373 (1892).

76. 28 U.S.C. § 2415(b). Subsection (b) also allows an action to be brought on or before sixty days after the publication of two lists promulgated by the Secretary of Interior which shall list all claims accruing to any tribe, band, or group of Indians or individual Indian on or before July 18, 1966. Thus, tribes may pursue a claim within six years after a right accrues or within one year of rejection of their listed claim by the Secretary of Interior.

77. 28 U.S.C. § 2415(g).

78. Although the statute of limitations is six years on this action, the Cayugas filed their action in 1980 and the statute of limitations runs in 1988, thus resulting in an eight year difference.

79. *Cayuga V*, 771 F. Supp at 22, *citing Oneida Indian Nation v. Oneida County*, 719 F.2d 525, 538 (2d Cir. 1983).

80. *Oneida II* precluded the borrowing of analogous state statutes to determine if the action was timely. In any event, however, the Cayugas sought enforcement of *federal* right based on the Non-intercourse Act. The applicable statute of limitations can be found in 28 U.S.C. § 2415(b).

81. Reference *available at* <http://www.bartleby.com>.

82. Although the number of recognized maxims may ironically vary with the length of the reader's foot, the slight variations on the same principles are of no consequence. Thus the maxims may be stated as follows; Equity will not suffer a wrong without a remedy; Equity follows the law; Where equities are equal first in time prevails; He or She who seeks Equity must do equity; The doctrine of Clean Hands—he or she who comes to equity must do so with clean hands; Equity aids the vigilant and not the tardy; Equity is Equality; Equity looks to the intent rather than the form; Equity looks on that which ought to be done as being done; Equity imputes an intention to fulfill an obligation; Equity acts in personam; Equity will not assist a volunteer (which is not traditionally attributed to the maxims).

83. Leavell, *supra* note 59, at 5.

84. *Cayuga*, 413 F.3d at 280 (dissent).

85. The district court, following the reasoning of *United States v. Imperial Immigration Dist.*, treated the remedy of ejectment as a request for a permanent injunction.

86. *Cayuga*, 413 F.3d at 282 (discussion of the lower court holding by the dissent).

87. *Id.* at 283 (citations omitted).

88. *Oneida I*, 414 U.S. at 683.

89. *Cayuga*, 413 F.3d at 285.

90. Laches is analogous to a Statute of Limitations, which forestalls a party from asserting a stale claim. A Statute of Repose defines and limits rights, whereas a Statute of Limitations bears on available remedies. Here again, the majority has conflated the concepts of rights and remedies.

91. *Cayuga*, 413 F.3d at 285 (citations omitted).

92. Pomeroy, *supra* note 50, § 425 at 190.

93. *Bauer v. P.A. Cutri Co.*, 253 A.2d 252, 255 (Pa. 1969).

94. *First Citizens Nat'l Bank v. MacAllister*, 371 A.2d 1175, 1176 (N.H. 1977), *quoting Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953).

95. *Ivani Contr. Corp. v. City of New York*, 103 F.3d 257, 262 (2d Cir. 1997) (citation omitted).

96. McClintock, *supra* note 2, § 24 at 53.

97. Lawrence Fred, 1 Equity Jurisprudence, § 61 at 93 (1929).

98. George Tucker Bispham, Principles of Equity, § 17 at 28 (11th ed., 1931).

99. "Equity aids the vigilant, not those who sleep on their rights" Because law needs another Latin phrase.

100. Bispham, *supra* note 98, § 18 at 29.

101. McClintock, *supra* note 2, § 28 at 71.

102. McClintock, *supra* note 2, § 28 at 75.

103. Pomeroy, *supra* note 50, § 419(e) at 180.

104. *United States v. Mack*, 295 U.S. 480, 489 (1935).

105. 357 U.S. 221, 225 n.7 (1958).

106. *Oneida II*, 470 U.S. at 244 n.16.

107. *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 170 (8th Cir. 1995).

108. *Id.* at 168-69.

109. *Van Antwerp v. Schultz*, 217 P.2d 1034, 1036 (Okla. 1950).

110. *M. Lowenstein & Sons v. Austin*, 430 F. Supp. 844, 846 (S.D.N.Y. 1977).

111. *Florian v. Lenge*, 880 A.D.2d 985, 995 (Conn. 2003) (citations and emphasis omitted).

112. *Carter v. Hoblit*, 755 P.2d 1084, 1088 (Ala. 1988).

113. *Columbus Bank & Trust Co. v. Dempsey*, 169 S.E.2d 349, 350 (Ga. 1969).

114. *Rogers Iron & Metal Corp. v. K & M Inc.*, 738 S.W.2d 110, 111 (Ark. 1987).

115. *Austin*, 430 F. Supp at 846.

116. However, given that *Oneida I* held state statute of limitations unavailable in these circumstances, and the United States did intervene on behalf of the tribe, this statute appears to be controlling. Additionally, the district court, as noted, declared the action timely because it would have been timely if filed by the United States. Thus, it appears that § 2415 would be a relevant statute of limitations.

117. *Ewert*, 259 U.S. at 135.

118. *Id.* at 138.

119. 271 U.S. 432, 439-40 (1926), *quoting United States v. Sandoval*, 231 U.S. 28, 45 (1913).

120. *Oneida I*, 414 U.S. at 670.

121. *Oneida II*, 470 U.S. at 247-48 (citation omitted).

122. At time of publication, the United States joined the Cayugas in applying for certiorari to the Supreme Court. Although the writ will not be reviewed until the spring term of 2006, the United States joined the appeal almost immediately after the verdict was rendered.

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Tribal Land Claims: Before and After *Cayuga*

By Arlinda Locklear

In 1792, Good Peter, an Oneida Chief, delivered a lengthy exposition about Oneida land to Timothy Pickering, the then federal Indian commissioner. Good Peter summarized the negotiations between the Oneida Nation and the State of New York, which led to the 1788 Treaty of Fort Schuyler. The Treaty resulted in a transfer of more than four million acres of Oneida aboriginal territory to the State and confirmed approximately 300,000 acres as the Oneida Reservation. Good Peter explained that the Oneidas believed that the 1788 transaction was intended to protect them in the possession of their land, only to be told afterward that the State had purchased their land from them. Good Peter noted the paltry sum that the State paid for the transaction, expressed alarm, "looking forward to our children and grandchildren, who should come after us," and sought Commissioner Pickering's assistance in obtaining fair compensation for the transaction.[1] Thus began a three-way struggle among the Oneida Nation, the State of New York, and the United States of America, that ended with State acquisition of virtually all Oneida territory.[2]

Throughout this struggle, the Oneidas continued to protest overreaching by the State and to seek assistance from the federal government.[3] For his part, Pickering, by then Secretary of War, attempted to stem the State's aggression by seeking the Attorney General's opinion on the State's authority to acquire tribal land without federal approval. Attorney General Bradford concluded that the recently enacted Indian Trade and Intercourse Act[4] applied to New York State and therefore Oneida land could be acquired only by a treaty held under the authority of the United States.[5] Immediately thereafter, and with the explicit approval of President Washington, Secretary Pickering transmitted Attorney General Bradford's opinion to Governor Clinton of New York.[6] Nevertheless, the State of New York ignored the letter and proceeded with its plans to acquire Oneida territory.[7]

Even after the dispossession was complete, the Oneidas continued to protest the loss of their lands. The nineteenth century record is replete with petitions to various federal government officials.[8] The State itself documented continuing claims and complaints.[9] The generations of protest produced nothing. Eventually, and consistent with a general trend in Indian country at the time, the Oneidas sought the protection of federal courts in 1970.

The important point of this brief history is to dispel the common myth that Oneida and other tribal land claims are technical disputes hatched by clever lawyers. To the contrary, Oneida and other tribal land claims are long-standing pleas for justice by the tribes, pleas that are bottomed on established legal principles well known to New York State, and have been asserted by the tribes for generations in every forum available to them. Two decades ago, when the United States Supreme Court upheld the tribal land claims in *Oneida II*, it did not create new law; it merely applied legal principles that were familiar both to the United States and New York. When deciding *City of Sherrill v. Oneida Nation of New York,* the Supreme Court expressly declined to disturb its *Oneida II* holding.[10] Thus, when the Second Circuit concluded that the *City of Sherrill* decision had "dramatically altered the legal landscape" regarding tribal land claims,[11] it was flatly mistaken.

". . . Oneida and other tribal land claims are long-standing pleas for justice by the tribes, pleas that are bottomed on established legal principles well known to New York State, and have been asserted by the tribes for generations in every forum available to them."

Because of the Second Circuit's fundamental misreading of Supreme Court precedent and the pernicious effect of this misreading, the Supreme Court is likely to review the *Cayuga* decision. The Cayugas and the United States recently filed petitions for certiorari to the Supreme Court in the case. Most importantly, though, neither the parties nor the public in general should conclude that the Second Circuit's *Cayuga* decision finally resolves the tribal land claims, whatever the outcome in the Supreme Court. Experience with tribal claims teaches otherwise.

Oneida II—One Hundred Years of Precedent

When the Oneidas filed their land claim in federal court, they asserted a claim against Madison and Oneida Counties for the counties' alleged trespass on Oneida land—land the State purported to acquire in a 1795 transaction that concluded without the approval of the United States. The Oneidas sought damages representing the fair rental value of the land for the two years preceding the date of filing, 1968 and 1969, as the reme-

dy. The district court found for the Oneidas and entered judgment in the amount of $16,694, plus interest, against the counties.[12] Subsequently, the Supreme Court granted certiorari "to determine whether an Indian tribe may have a live cause of action for violation of its possessory rights that occurred 175 years ago."[13] The Court found that the Oneidas did indeed hold a live federal common law claim for relief and affirmed the lower courts' judgment in damages.[14]

In so holding, the Court relied upon a long and distinguished line of its previous cases. As the Court noted, numerous of its prior decisions had "at least implicitly [acknowledged] that Indians have a federal common law right to sue to enforce their aboriginal rights."[15] In *Johnson v. M'Intosh*, the Court declared two private purchases in 1773 and 1775 invalid without Crown consent.[16] This decision, the Court observed a few years later, established that an action of ejectment could be maintained on an Indian right to occupancy and use.[17] And in the landmark case *United States v. Santa Fe Pacific R.R. Co.*, the Supreme Court held that Indians had a common law right of action for an accounting of "all rents, issues and profits" against trespassers on their aboriginal territory.[18] According to the *Oneida II* Court, these earlier cases supported the money damages judgment entered for the Oneidas to vindicate violation of their federal common law right to their lands, notwithstanding the passage of 175 years.[19]

Nothing in the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*[20] is either on point or inconsistent with any of the analysis in *Oneida II*.[21] *Oneida II* was a land claim case and *City of Sherrill* was a tax case—the nexus being that both cases involved the Oneida Reservation confirmed in the Treaty of Canandaigua[22] on Nov. 11, 1794 and lost to the Oneidas through illegal transactions with New York State. As the Court stated in *City of Sherrill*, "In contrast to *Oneida I* and *II,* which involved demands for monetary compensation, OIN [Oneida Indian Nation] sought equitable relief prohibiting, currently and in the future, the imposition of property taxes."[23] The *City of Sherrill* Court perceived the latter to be too disruptive in its effect and, therefore, barred by the passage of time. In doing so, the *City of Sherrill* Court had no need to, and did not, address the hundred years of precedent relied upon by the Court in *Oneida II*.[24]

To the contrary, in its principal discussion of the Oneida land claim litigation itself, the *City of Sherrill* Court noted with approval the district court's holding that monetary damages are the appropriate and, according to that court, apparently sole remedy now available in land claim litigation.[25] By embracing the analysis of the district court in the Oneida land claim litigation, the *City of Sherrill* Court appeared to embrace the result there as well, i.e., that money damages against the State of New York remain available. Thus, the *City of Sherrill* Court concluded that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II.*"[26] Any fair reading of the Court's decision in *City of Sherrill* indicates that *Oneida II,* and the money damages upheld therein, remains sound law.[27]

Cayuga—A Legal About-Face

With the lightest possible analysis, the Second Circuit Court of Appeals concluded that the *City of Sherrill* decision compelled the dismissal of all remedies, even money damages, in the Cayuga land claim.[28] The court did so without reference to the hundred years of precedent underlying the Supreme Court's *Oneida II* decision (which was expressly left undisturbed in *City of Sherrill*) and without reference to the Court's apparent approval of the district court's determination in the Oneida land claim case (which expressly preserved money damages against New York State in that land claim).[29] In short, it was the Second Circuit in *Cayuga,* not the Supreme Court in *City of Sherrill,* that dramatically altered the landscape in tribal land claims by effectively overturning the Supreme Court's decision in *Oneida II* on the question of availability of damages as a remedy in such claims.

The Second Circuit's decision in *Cayuga* will also have pernicious effects in other tribal claims, if not set right by the Supreme Court. The 1794 Treaty of Canandaigua is an important underpinning of the Cayuga land claim, as it is with other Iroquois claims in New York State.[30] Other important tribal claims are also based on federal treaties: water rights;[31] hunting, fishing, and gathering rights;[32] and tribal independence from state law.[33] The Second Circuit's light analysis suggests possible limitations on all of these treaty rights based on the passage of time limitations not found in any of the cases cited above.

There is obviously a leap from the *City of Sherrill* decision to the *Cayuga* decision. This leap is dramatic and unwarranted—one that can be made only by the United States Supreme Court, if at all. There is also a great deal at stake in the *Cayuga* case, not only for the Cayugas but perhaps for Indian country, as well. As this article is being published, lawyers on both sides of the case will submit briefs to the Supreme Court on the importance and correctness of the *Cayuga* decision. Whatever the outcome of that case, all affected parties and governments need to face the reality that the tribal land claims will not go away until the underlying morality of the claims is acknowledged and addressed.

The Tribal Land Claims—A Moral Imperative

This article began with the observation that tribal land claims in New York have persisted to this day because of the strong sense of loss and injustice by the tribes themselves, not because of the efforts of lawyers. This sense of loss and injustice is palpable with the tribes, often experienced personally by tribal citizens. The tribes' sensibilities did not originate with any court decision and will not dissipate with any court decision. Just as past generations have carried that sensibility forward, future generations will do the same.

"Repose and certainty will come only in the form of honorable, fair settlements of the land claims negotiated between the State of New York and the tribes."

The country's experience with tribal claims against the United States is instructive in this regard. Like the New York tribal land claims, tribal claims against the United States have existed for generations, arising most often from unjust federal dealings in tribal land or failure to honor treaty commitments. For most of the country's history, these claims were barred in court by the United States' sovereign immunity, jurisdictional bars, and statutes of limitations.[34] On occasion, Congress enacted special legislation authorizing a particular tribe to sue on a particular claim, notwithstanding the United States' sovereign immunity or the passage of time. Between 1836 and 1946, Congress enacted 142 such special acts.[35]

In the face of the tribes' persistence, Congress eventually enacted the Indian Claims Commission Act in 1946. This Act created a unique forum for adjudicating historic tribal claims against the United States and waived statute of limitations and laches defenses for that purpose.[36] The Indian Claims Commission has since concluded its work and transferred its remaining docket to the Court of Federal Claims. Lawyers have both praised and criticized the work of the Indian Claims Commission.[37] However, there is no doubt that the tribes' continuing sense of injustice led to the creation of this special forum to hear historic claims, notwithstanding the passage of time.

As even its proponents acknowledge, the laches defense found by the Second Circuit to bar the Cayuga land claim is a defense based upon the passage of time; it does not deny or alter the underlying merit of the claim that the State illegally dispossessed the tribe of its land. Justice Stephens dissented in *Oneida II,* arguing that laches should have been applied by the Court to bar the claim. Stephens examined whether certain recent federal statutes had revived the claims, since those claims had already been barred by the passage of time in his view. He concluded that those statutes did not revive the claims, but he did not deny that such was possible to overcome jurisdictional or time-based bars to otherwise legitimate claims.[38] In this regard, the New York tribal land claims are similar to the historic claims revived by Congress in the Indian Claims Commission Act.

Federal legislation to revive the New York tribal lands is hardly likely in the foreseeable future, in the event the *Cayuga* Second Circuit ruling is not overturned. Further, an Indian Claims Commission-type forum may not be the appropriate step for Congress to take, even if Congress were inclined to consider the issue. As noted above, the Indian Claims Commission enjoyed a mixed review.

The point is this: the New York tribes have pressed their land claims for generations and will continue to do so, regardless of the final outcome of the *Cayuga* case. Repose and certainty will come only in the form of honorable, fair settlements of the land claims negotiated between the State of New York and the tribes. This has occurred in other states, resulting in stability and respectful government-to-government relations in those claim areas.[39] In the interests of justice to the tribes, and finality to all concerned, the same should occur in New York State.

Endnotes

1. Timothy Pickering, 60 Letters and Papers of Pickering's Missions to the Indians, 1792-97 15 (Massachusetts Historical Society); *see generally Oneida Indian Nation of New York v. United States*, 37 Ind. Cl. Comm. 522 (1976).
2. *County of Oneida v. Oneida Indian Nation of New York,* 470 U.S. 226, 229-30 (1985) (*Oneida II*).
3. Approximately twenty-five transactions took place between the Oneida Nation and New York State during this time affecting portions of the Oneida Reservation. *See* Report of Special Committee appointed by the Assembly of the 1888 to Investigate the "Indian Problem" of the State of New York, N.Y. Assem. Doc. 51 (1889) [hereinafter Whipple Report]. While these dealings appear to be arm's length transactions, they were not. The historical record demonstrates that the Oneidas parted with their land only as a result of social and economic pressures to do so and in the face of unregulated non-Indian encroachment. *Oneida Indian Nation of New York v. County of Oneida,* 434 F. Supp. 527, 535-36 (N.D.N.Y. 1977), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985) (*Oneida II*); *Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 405-06 (1978).
4. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177).
5. *Oneida Indian Nation*, 434 F. Supp. at 534.
6. *Oneida Indian Nation*, 43 Ind. Cl. Comm. at 380.
7. The focus of this article is on Oneida history. However, other Iroquois people suffered similar loses at the hands of New York State, giving rise to similar legal claims. *See generally* Whipple Report.

8. *Oneida Indian Nation*, 434 F. Supp. at 536.

9. *See generally* F. Hough, ed., Proceedings of the Commissioners of Indian Affairs (1861); Helen Upton, The Everett Report in Historical Perspective: The Indians of New York (New York State American Revolution Bicentennial Comm. 1980).

10. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 1494 (2005).

11. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005).

12. *Oneida II,* 470 U.S. at 230.

13. *Id.*

14. *Id.* at 230, 253.

15. *Id.* at 235.

16. 21 U.S. (8 Wheat.) 543, 604 (1823).

17. *Marsh v. Brooks,* 49 U.S. (8 How.) 223, 232 (1850).

18. 314 U.S. 339, 344, 360 (1941); *see also* cases cited in *Oneida II*, 470 U.S. at 235-36.

19. *Oneida II*, 470 U.S. at 236. *See also Edwardson v. Morton*, 369 F. Supp. 1359, 1371-72 (D.C. Cir. 1973), *cited with approval, Oneida II*, 470 U.S. at 236 n.6 (citing the basic principle that money damages are available for trespass on natives' land).

20. 544 U.S. 197, 125 S. Ct. 1478 (2005).

21. 470 U.S. 226 (1985).

22. 7 Stat. 44 (Nov. 11, 1794).

23. *City of Sherrill,* 125 S. Ct. at 1488.

24. It should be noted that Justice O'Connor was the only justice on the Court who was in the majority in *Oneida II* and also in the majority in *City of Sherrill.* She saw no need to revisit the analysis in the former while joining in the latter.

25. *See City of Sherrill,* 125 S. Ct. at 1494. As the Court explained, the district court held in 2000 that the Oneida land claim litigation would be limited to damages against the State of New York, refusing to allow the Oneidas to amend their complaint by adding any claims against private landowners. *See Oneida Indian Nation of New York v. County of Oneida,* 199 F.R.D. 61 (N.D.N.Y. 2000). The district court did so because of the "impossibility" of restoring the Oneidas to possession of their land. The Court expressly adopted this reasoning in *City of Sherrill* to reject reacquisition of sovereign status of Oneida territory by purchase alone. *City of Sherrill,* 125 S. Ct. at 1492-93.

26. *City of Sherrill,* 125 S. Ct. at 1494.

27. Indeed, the Supreme Court in *Oneida II* anticipated the possible restriction of available remedies for the land claims. After upholding the claim and the award of money damages, the Supreme Court in the end specifically cautioned that the availability of other remedies remained an open question: "The question whether equitable considerations should limit the relief available to the present day Oneida Indians was not addressed by the Court of Appeals or presented to this Court by petitioners. Accordingly, we express no opinion as to whether other considerations may be relevant to the final disposition of this case should Congress not exercise its authority to resolve these far-reaching Indian claims." *Oneida II,* 470 U.S. at 253 n. 27. Whatever those other considerations may be, then, those considerations do not indicate that money damages are not available.

28. *Cayuga Indian Nation*, 413 F.3d at 277.

29. *See City of Sherrill,* 125 S. Ct. at 1494.

30. *See generally Cayuga Indian Nation v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991).

31. *See generally Arizona v. California,* 373 U.S. 546 (1963) (addressing rights to water from the Colorado River); *Winters v. United States,* 207 U.S. 564 (1908) (upholding the validity of a treaty that had reserved rights to water from the Milk River in Montana for the benefit of an Indian Reservation).

32. *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 177 (1999); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 838 (1979).

33. *See* Frederick Cohen, Cohen's Handbook of Federal Indian Law § 2.02 (2005 ed.).

34. *See generally* Glen A. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 Geo. L. J. 511 (1966).

35. *See Creation of Indian Claims Commission: Hearings Before the Comm. on Indian Affairs,* 79th Cong. 163-66 (1945).

36. Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (formally codified at 25 U.S.C. § 70).

37. Frederick Cohen, Cohen's Handbook of Federal Indian Law § 5.06[3] (2005 ed.).

38. *Oneida II*, 470 U.S. at 270-73.

39. *See* 25 U.S.C. ch. 19 (settling several land claims).

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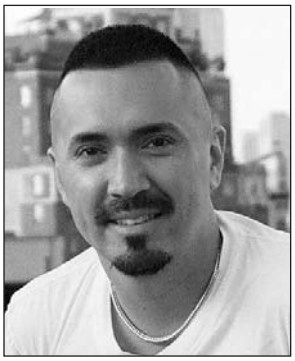
Protecting Mother Earth for the Seventh Generation

By Grant W. Jonathan

Seventh Generation



One of the principal traditions of the Haudenosaunee[1] (*pronounced Ho-de-no-show-nee, meaning "People of the Longhouse"*) or Iroquois Confederacy, which includes the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora Nations, is to consider the ramifications of all decision making upon the future Seventh Generation. This tradition is unique to Haudenosaunee communities and is still practiced today by Haudenosaunee leadership. When addressing environmental matters within their communities, this tradition mandates that Haudenosaunee leadership make decisions that will not bring pain, harm, or suffering to seven generations into the future. This reverence and consideration is implemented in territories where the community is governed by its traditional Council of Chiefs and those Clan Mothers who selected the Chiefs as leaders.

When industries or local and state governments make environmental decisions regarding non-reservation aboriginal lands, they consider primarily the economic or technological/industrial practices involved rather than the seventh generation principle. Problems arise because these decision makers fail to consult with Haudenosaunee leadership in any meaningful way during the decision-making process. The Haudenosaunee Nations, perceived as ordinary stakeholders and not as sovereign Indian Nations with legitimate concerns or interests, are not afforded an opportunity to be heard. Instead of seeking Haudenosaunee participation early in the process, consultation, if it occurs at all, happens at the eleventh hour. This results in final decisions that harm the physical, spiritual and cultural environments of Haudenosaunee communities.

The aboriginal territories of the Haudenosaunee include almost all of upstate New York and start from the eastern part of the State near Albany to western New York near the cities of Buffalo and Niagara Falls. The restoration of these territories is important to the Haudenosaunee because its Nations have many significant cultural and historical sites, former village sites, burial grounds, and sacred places that they want protected and to remain undisturbed. Some of these sites include rivers, creeks, lakes, swamps and springs that were used for centuries by the Haudenosaunee for ceremonial use, medicinal purposes, sustenance and enjoyment. Today, these resources are not clean as they once were because of pollution originating from outside sources.

Tonawanda Creek flows through the Tonawanda Seneca territory and is subjected to non-point source pollution and other point source discharges upstream which then flow into the heart of the territory. Fishing in Tonawanda Creek is subject to consumption restrictions because of the contaminated fish. Cayuga Lake and its tributaries are within the aboriginal territories of the Cayuga Nation. The Cayuga Nation sites of concern are landfills, industrial sites, and point/non-point source discharges into the Nation's aboriginal territorial waters. Onondaga Creek and Onondaga Lake are sacred to the Onondaga Nation. The Onondaga people can no longer fish in Onondaga Creek because the fish are contaminated or sometimes there are no fish to be found. Onondaga Lake is very sacred because on its shores is where the Iroquois Confederacy was founded. This sacred site needs to be protected because ceremonies can no longer take place on those shores because of congestion, pollution, and the inability to gain access. The Tuscarora Nation relied upon the fish of the Niagara River for sustenance. Once the River was teeming with fish, however, pollution has greatly diminished the quantity of fish in the River and the amount of fish that can be eaten must be limited because of contamination.

With these matters of concern in mind, meaningful consultation with the Haudenosaunee regarding these matters would allow them to be involved in decisions made or actions taken with the hope that Mother Earth can be protected for the seventh generation. Developing partnerships and/or cooperative agreements between the Haudenosaunee and outside entities would allow all parties to work together to protect and restore the resources within aboriginal territories.

The Two Row Wampum Treaty—Guswentah

Asserted in all Haudenosaunee negotiations with the U.S. government and also the State of New York are the principles of the Two Row Wampum or "Guswentah."[2] The Two Row Wampum is a treaty which symbolizes the agreement under which the Haudenosaunee welcomed all Europeans to their lands.[3] This treaty was presented to the Dutch, the French, Great Britain, the United States, and also to the State of New York.[4] Guswentah has three principles to promote harmony: the first principle is friendship, the second principle is peace, and the third principle is forever, meaning that

this agreement will last forever. Haudenosaunee oral tradition for this treaty is as follows: "We will NOT be like Father and Son, but like Brothers. . . . These TWO ROWS will symbolize . . . vessels, traveling down the same river together. One . . . will be for the Original People, their laws, their customs, [and] [t]he other for the [European] people and their laws, their customs and their ways. We shall each travel the river together, . . . but [each] in our [own] boat. [And] [n]either of us will try to steer the other's vessel."[5] This agreement has been kept by the Haudenosaunee to this day.

Federal Consultation

Whenever the U.S. Environmental Protection Agency (EPA) consults with Haudenosaunee leaders on environmental matters of interest, the Haudenosaunee frequently remind the Agency of the principles underlying the Guswentah treaty. The Haudenosaunee lay down this framework first and foremost because Haudenosaunee leaders are very much aware of the federal government's trust responsibility to all Indian tribes within the boundaries of the United States. The federal government's interpretation of this trust responsibility is to act as a guardian of all federally recognized Indian tribes and that all Indian tribes are its wards to protect.[6] However, Haudenosaunee leaders have a different perception of this relationship and assert it during consultations with EPA. Haudenosaunee interpretation is that this federal trust relationship is not a guardian-ward or parent-child relationship but a brother-to-brother, government-to-government, or nation-to-nation relationship with the U.S. government. This assertion also involves a reminder by Haudenosaunee leaders to EPA representatives of its federal treaty obligations under certain treaties made between the Six Nations and the U.S. government during the late 1700s such as the Treaty of Canandaigua in 1794.[7]

Like other federal agencies, EPA must act in accordance with the federal trust responsibility when taking agency action that might affect tribes,[8] such as during consultations with the Indian Nations in New York for environmental matters located on both reservations and within aboriginal territory (off-reservation).[9] While fulfilling its mission of "protect[ing] human health and the environment,"[10] the EPA strives to satisfy the provisions of the Agency's Indian Policy[11] by consulting with tribes and continuing to work on building effective partnerships and/or cooperative agreements with the Indian Nation governments within New York.

State Consultation

The State of New York and its local government representatives are of the opinion that the State has no obligation to consult with Indian Nation leadership in New York because they do not have the same trust responsibility or fiduciary obligations to these Nations as that of the federal government. However, the Governor of New York State issued a state-wide policy requiring all state agencies within the Executive Branch to engage in formal government-to-government dialogue with legitimate representatives of State or federally recognized Indian Nations or tribes where necessary.[12] The purpose of this policy was to prevent dissident factions or non-recognized "tribes" from establishing unilateral contacts with the State.[13] Communications from various dissident factions or non-recognized tribes caused tension between the legitimate Indian governments and the Governor's Office, adding unnecessary complications to already sensitive and complicated matters. To avoid such situations, all agency personnel are required to report any contacts made by Indian tribes or nations to the Governor's Counsel's Office before engaging in any further contact.[14] This means that before agency personnel can reply to any correspondence, return a phone call, schedule a meeting, or share information of any kind, they are directed to wait for further instructions from the Governor's Counsel's Office.[15] This policy was also formally applied to all State University of New York Universities and Colleges on November 30, 2001.[16]

While this policy seeks to promote government-to-government dialogue with legitimate representatives of Indian Nations in New York, it has hindered the progress of consultation with the Indian Nations in a timely manner and also EPA's progress in consulting on matters within the aboriginal territories.

Never has there been a stronger need for the development of partnerships and cooperative agreements between state/local governmental entities and their neighboring Indian/Haudenosaunee Nation governments than now. But the complexities associated with on-going litigation and complicated negotiations between several of New York's Indian Nations and the State of New York involving ancient Indian land claims, taxation matters, and gaming compact negotiations and casino development for some of the Indian Nations has frustrated the planning and development of such partnerships.[17] In addition, differing legal views about their respective jurisdiction have caused the State of New York and some of the Indian Nations to aggressively compete for authority, particularly with regard to lands purchased by Indian Nations within ancient Indian land claim areas in New York. Also adding to the frustration is a lack of trust among the Haudenosaunee leadership due to the State of New York's illegal treaty making with the Six Nations during the late 1700s and 1800s.[18]

Despite the differences regarding jurisdiction and the aforementioned other issues, many points of agreement and/or partnership could still be negotiated

between the Indian Nations and the State of New York to address environmental matters to the mutual self-interest of both parties. One such partnership or agreement could be created between New York and one or more Nations in the same manner as two states making an agreement as sovereign-to-sovereign. Other options could include partnerships/cooperative agreements where an Indian tribe in another state has developed a partnership and/or cooperative agreement with an agency of the U.S. government or with another state. The partnerships/cooperative agreements would contain provisions that focus upon proper protocols, information exchanges, trans-boundary coordination, and other important protocols and consultation considerations. In some cases, written agreements may not even be necessary. Frequent outreach, interaction and dialogue would be a matter of course to keep open the channels of communication between the State and the Indian Nations. The goal would ultimately be the same: to clean up, restore, and/or protect the environment. If New York State can change its perception that its Indian Nations are not solely its adversary but also its partner, the principles of the Two Row Wampum may be embraced leading to the effective partnerships and agreements with Indian Nations to address harm in the environment of aboriginal territories.

Endnotes

1. Haudenosaunee (pronounced Ho-de-no-show-knee) is an Iroquoian term meaning "People of the Longhouse" or "People Building a Longhouse." The term is used to identify the six original Nations of the Iroquois Confederacy: the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora. The term "Haudenosaunee" is not used by three federally recognized successive Indian Nations in New York State: the Seneca Nation of Indians, the St. Regis Mohawk Tribe, and the Oneida Indian Nation. *See* Haudenosaunee Home Page, *at* <http://sixnations.buffnet.net/>.
2. *See* Two Row Wampum Belt, Onondaga Nation, *at* <http://www.onondaganation.org/ wampum.tworow.html>; Degiya'göh Resources, Guswenta (Kaswentha): Two Row Wampum, *at* <http://www.degiyagoh.net/guswenta_two_row.htm>.
3. *See id.*
4. *See id.*
5. Degiya'göh Resources, *supra* note 2.
6. The Federal Government's federal trust responsibility arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes and imposes moral obligations and fiduciary duties upon federal agencies to discharge duties diligently toward tribes when engaging in conduct pursuant to this federal trust relationship.
7. *See* Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794).
8. *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, *Crow Tribe of Indians v. Environmental Protection Agency*, 454 U.S. 1081 (1981).
9. *See* Consultation and Coordination with Indian Tribal Governments: Exec. Order No. 13175, 65 Fed. Reg. 67249 (2000); *See also* Press Release, The White House, Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments (September 23, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html>.
10. Environmental Protection Agency, About EPA, *at* <http://www.epa.gov/epahome/ aboutepa.htm#mission>.
11. *See* Environmental Protection Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations, *at* <http://www.epa.gov/indian/1984.htm>. In 1984, EPA became the first federal agency to adopt a formal Indian policy. This policy has since been reaffirmed by every subsequent Agency Administrator, including Administrator Stephen Johnson in 2005. This policy is intended to provide guidance to EPA staff and managers in dealing with tribal governments and in responding to the problems of environmental management on Indian reservations in order to protect tribal health and environments.
12. *See* State Policy Memoranda from the Secretary to the Governor, Bradford J. Race, State of New York Executive Chamber (Nov. 20, 2001) [hereinafter State Policy Memo]. *See also* State University of New York Memoranda from D. Andrews Edwards regarding "Contact with Indian Nations" (Nov. 30, 2001) [hereinafter State University Memo].
13. State Policy Memo, *supra* note 12.
14. *Id.*
15. *Id.*
16. *See* State University Memo, *supra* note 12.
17. *See, e.g.*, *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002); *Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005); *Stockbridge-Munsee Cmty. v. Oneida Nation of New York*, No. 86-CV-1140, 2003 U.S. Dist. LEXIS 12703 (N.D.N.Y. July 24, 2003); *Canadian St. Regis Band of Mohawk Indians v. New York*, 278 F. Supp. 2d 313 (N.D.N.Y. 2003); *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002); *Onondaga Indian Nation v. New York*, No. 97-CV-445, 1997 U.S. Dist. LEXIS 9168 (N.D.N.Y. June 24, 1997).
18. *See, e.g.*, *Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 535 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985) (discussing the history of treaty making between New York and the Oneida Nation).

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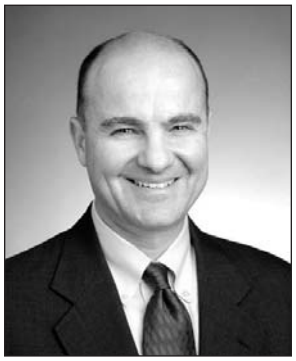
Haudenosaunee Hunting and Fishing Rights in New York State

By Christopher A. Amato

I. Introduction



The geographic territory known today as New York State was and continues to be home to the Indian nations comprising the Haudenosaunee Confederacy, also known as the Iroquois Confederacy or the Six Nations. From time immemorial, the Haudenosaunee hunted and fished throughout much of New York State on a communal basis; Haudenosaunee citizens were free to hunt and fish throughout Confederacy territory, regardless of the member nation to which they belonged.[1] The 1794 Treaty of Canandaigua[2] explicitly recognized Haudenosaunee communal hunting and fishing rights by guaranteeing to all of the Six Nations the "free use and enjoyment" of all lands covered by the Treaty, regardless of which Nation enjoyed possessory rights to a particular territory.[3]

Following European settlement and creation of the reservations where most Haudenosaunee currently reside, the Haudenosaunee continued to hunt and fish as their ancestors did. For years, the New York State Department of Environmental Conservation ("DEC") has routinely issued citations to Haudenosaunee citizens hunting or fishing off-reservation for purported violations of state hunting and fishing regulations.[4] Even though many of these alleged violations have occurred on lands concerning which the Treaty of Canandaigua guarantees to the Six Nations "free use and enjoyment," the DEC has failed to recognize those treaty rights.

This article describes the identity and location of the Haudenosaunee nations in contemporary New York, examines the communal approach to hunting and fishing rights historically practiced by the Haudenosaunee, and discusses how the Treaty of Canandaigua explicitly recognized that practice in its "free use and enjoyment" provisions.[5] The article then summarizes some recent DEC enforcement actions against Haudenosaunee exercise of their off-reservation hunting and fishing rights. The article concludes by advocating that New York follow the lead of other states by adopting a new approach that reconciles Haudenosaunee treaty rights and DEC conservation objectives.

II. Haudenosaunee Nations in New York

The nations of the Iroquois Confederacy,[6] or Six Nations,[7] call themselves the *Haudenosaunee*, which means "People of the Longhouse."[8]

The Six Nations include the Mohawk Nation, the Oneida Nation, the Onondaga Nation, the Cayuga Nation, the Tuscarora Nation, and the Seneca Nation. Each Haudenosaunee nation has a traditional government that maintains "government-to-government" relations with the United States. Most of these governments are also federally recognized, a status conferring immunities and privileges and establishing eligibility for various social, educational and health services provided through the Bureau of Indian Affairs.[9] In addition, there are non-traditional governments recognized by the United States.[10]

"From time immemorial, the Haudenosaunee hunted and fished throughout much of New York State on a communal basis . . ."

The Haudenosaunee nations occupy reservations in Northern and Western New York.[11] These reservations range in size from approximately 30 acres (Oneida),[12] to approximately 26,000 acres (the Mohawks' Akwesasne territory, which lies on the St. Lawrence River and spans the international boundary between the United States and Canada).[13] Despite the relatively small geographic territory they currently occupy, the historic control exercised by the Haudenosaunee over much of contemporary New York State[14] means that Haudenosaunee hunting and fishing traditionally occurred over territories substantially larger than those currently occupied.

III. Communal Hunting and Fishing by the Haudenosaunee

Historically, the Haudenosaunee engaged in communal sharing of hunting and fishing resources. The tradition of the Six Nations, based on the teachings of Dekanawideh (also known as the Peacemaker), the founder of the Confederacy, recognized communal hunting and fishing rights for all members of the Six

Nations throughout the territories occupied or controlled by the Confederacy.[15] The Great Law of Peace binding the Confederacy together states, "[t]he Lords of the Confederacy shall eat together from one bowl the feast of cooked beaver's tail. While they are eating they are to use no sharp utensils for if they should they might accidentally cut one another and bloodshed would follow."[16] Among the Haudenosaunee, eating is "a symbol of unity: to eat out of the same dish; to eat with one spoon; to eat across the fire from each other. [The Haudenosaunee] alliance with the French was often described as a bowl out of which beaver was eaten with one spoon."[17]

The communal approach to hunting and fishing was even extended beyond the boundaries of Haudenosaunee territory in peace agreements with other Indian nations or confederacies. For example, in 1701 the Haudenosaunee and the Anishinabek (Union of Ontario Indians) orally transacted a treaty and created a wampum belt expressing its terms. The wampum belt has an image of a bowl with one spoon, representing that both confederacies "would share their hunting grounds in order to obtain food. The single wooden spoon in the bowl meant that no knives or sharp edges would be allowed in the land, for this would lead to bloodshed."[18]

IV. The Treaty of Canandaigua

In examining the Treaty of Canandaigua, it is important to understand the historical context in which the Treaty was negotiated. First and foremost, the Treaty was a peace treaty intended to ensure the neutrality of the powerful Six Nations[19] in the war that occurred after the Revolutionary War between the United States and the Indian tribes occupying the Northwest Territory (the lands west of present day Pennsylvania and New York).[20] In fact, the decision to treat with the Six Nations was made because "rumors began to circulate that [the Six Nations], or at least the Senecas, might join the western Indians and take up arms against the United States."[21]

The historical record indicates that the meeting between representatives of the Six Nations and the United States at Canandaigua in 1794 was "for the purpose of amicably removing all causes of misunderstanding and establishing permanent peace and friendship between the United States and the Six Nations."[22] In order to ensure peace, the Treaty not only explicitly guaranteed the rights of the Six Nations to remain undisturbed in their possession, use and enjoyment of the lands then occupied and used, but also restored to the Six Nations some lands that had been previously ceded in the Treaty of Fort Stanwix.[23]

Article I of the Treaty announced that "[p]eace and friendship are herely firmly established, and shall be perpetual, between the United States and the Six Nations."[24] In furtherance of its purpose to preserve peace between the United States and the Six Nations, the Treaty delineated in Articles II and III the lands then possessed by the Oneida, Onondaga, Cayuga, and Seneca nations, and acknowledged those lands to be their property.[25]

Article III of the Treaty of Canandaigua delineated the lands of the Seneca Nation including, as noted above, lands previously ceded by them in the Treaty of Fort Stanwix. After delineating the boundaries of the Seneca lands, the Treaty stated:

> Now, the United States acknowledge 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, or of their Indian 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.[26]

This commitment on the part of the United States was then reiterated in Article IV:

> The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, *and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof*: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.[27]

Article III's explicit guarantee to *all* of the Six Nations the right to "free use and enjoyment" of the lands recognized as belonging to the Seneca, and Article IV's similar guarantee to *all* of the Six Nations the right to free use and enjoyment of *all* lands covered by the Treaty are not merely artifacts of treaty draftsmanship, but an official recognition of established Haudenosaunee custom and practices. Consistent with that tradition, Articles III and IV explicitly and unambiguously recognized and guaranteed free use and enjoyment of all lands covered by the Treaty to each of the Six Nations. That such free use and enjoyment necessarily includes the right to hunt and fish on those lands

has never been subject to dispute,[28] and is corroborated by at least one contemporaneous account of the treaty negotiations at Canandaigua.[29] The only New York court to have considered the issue explicitly found that the Treaty guarantees hunting and fishing rights.[30]

V. State Enforcement Actions Against Off-Reservation Hunting and Fishing by Haudenosaunee

Enforcement of state hunting and fishing regulations against Haudenosaunee citizens exercising off-reservation treaty rights is a recurring issue in New York. In recent years, Haudenosaunee have been prosecuted for failure to carry a hunting license;[31] fishing without a license;[32] fishing in closed waters;[33] possessing untagged deer;[34] taking deer during closed season;[35] possession of fish exceeding take limit;[36] hunting in a non-designated area;[37] possession of a firearm in a state park;[38] and failing to have a name and address on a piece of ice-fishing equipment.[39]

Some of the prosecutions have been clearly unwarranted under New York law. For example, DEC policy commits the Department to honor Haudenosaunee enrollment cards in lieu of state-issued hunting or fishing licenses.[40] Consequently, several of these cases have been dismissed on motion by the district attorney.[41]

VI. The Need for a New State Policy

New York needs to reassess its posture toward Haudenosaunee hunting and fishing rights that are guaranteed by the Treaty of Canandaigua. On the most basic level, honoring treaty rights does credit to New York's government and all of its citizens by showing that we honor tradition, the rule of law, and our word. On the other hand, DEC has valid conservation and public safety concerns regarding hunting and fishing occurring outside the normal regulatory scheme. Fortunately, both legal and practical precedent exist for reaching a middle ground that honors treaty rights and at the same time furthers New York's conservation objectives. The Conservation Necessity Doctrine provides the legal framework while the practical framework is provided by the examples set by other states that have successfully partnered with Indian nations on natural resource and treaty issues.

A. The Conservation Necessity Doctrine

The Conservation Necessity Doctrine arises from the basic legal premise, enshrined in the Supremacy Clause of the United States Constitution, that states are bound to respect the terms of treaties entered into with Indian nations.[42] It is a bedrock constitutional principle that Indian treaties, like treaties with foreign nations, are the supreme law of the land.[43] One of the natural consequences of the Supremacy Clause is that Congress alone has the power to abrogate a treaty or to impose additional limitations on Indian treaty rights.[44]

The underpinning of the doctrine was first enunciated by the United States Supreme Court in dicta in *Tulee v. Washington*.[45] In *Tulee*, the defendant Indian was convicted of violating a state fishing regulation prohibiting the netting of salmon off-reservation without a state license. The defendant appealed, claiming that the regulation violated his treaty rights. In holding that the state lacked authority to assess license fees against the defendant by virtue of the treaty, the Court noted in passing that "the treaty leaves the state with power to impose on Indians, equally with others, *such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*."[46]

The principle that a state may regulate off-reservation Indian treaty fishing only to the extent that the regulations accomplish conservation goals was further elaborated on by the Court in *Puyallup Tribe v. Department of Game of Washington* (*Puyallup I*),[47] and *Department of Game of Washington v. Puyallup Tribe* (*Puyallup II*).[48] These cases stressed that state regulation of off-reservation treaty fishing is permissible only if it is necessary for conservation purposes and does not discriminate against Indians.

The holdings in *Puyallup I* and *Puyallup II* were further elaborated in the seminal case on state regulation of off-reservation fishing by Indians, *United States v. Washington*,[49] which, for the first time, articulated the "appropriate standards" by which state regulations must be judged. In *United States v. Washington*, a group of Indian tribes and the United States government sought declaratory and injunctive relief concerning the tribes' off-reservation treaty right fishing, including injunctive relief to enjoin enforcement of the state's fishing regulations against tribal fisherman who were fishing off-reservation. After reviewing the Supreme Court cases addressing the issue, the district court held:

> Although state police power permits state regulation of the exercise of off reservation treaty fishing rights, under all of the United States Supreme Court decisions cited or quoted . . . there can be no doubt that it is *not* within the province of state police power, however liberally defined, to deny or "qualify" rights which are made the supreme law of the land by the federal constitution. Therefore, in each specific particular in which the state undertakes to regulate the exercise of treaty right fishing, all state officers responsible therefor must

> understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that *any* regulation will restrict the exercise of a right guaranteed by the United States Constitution. *Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish*.[50]

The Court then elaborated that the term "conservation" "is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish."[51] "Reasonable" was defined by the Court as meaning "a specifically identified conservation measure is appropriate to its purpose," and "necessary" as meaning "such purpose in addition to being reasonable must be essential to conservation."[52]

One year after *United States v. Washington* was decided, the Supreme Court expanded its previous *Puyallup I* discussion in *Antoine v. Washington*.[53] In *Antoine*, defendant Indians were convicted of violations of state game laws while hunting on lands that were formerly part of their tribe's reservation, but had later been ceded to the United States. After quoting the language from *Puyallup I* that the state may regulate Indians engaged in treaty hunting or fishing off reservation "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against Indians," the Court went on to elaborate that "[t]he 'appropriate standards' requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary in the interest of conservation."[54]

The Conservation Necessity Doctrine, first enunciated by the Supreme Court in *Tulee* and *Puyallup I* and expanded in *United States v. Washington* and *Antoine* has been consistently applied by both federal and state courts.[55]

B. Success Stories from Other States

On a practical level, judicial recognition and enforcement of the Conservation Necessity Doctrine has compelled states and Indian nations to enter into partnerships through which critical natural resources are jointly managed in a way that preserves treaty rights, while at the same time achieving conservation objectives. In fact, the successful partnerships of other states and Indian nations provides clear hope that issues concerning off-reservation hunting and fishing can be resolved through joint action by New York State and the Haudenosaunee Confederacy.

Successful state-tribal partnerships in resource management take different forms, depending on the resources at issue and the particular concerns of the parties. For example, in Washington State, where both Indian and non-Indian commercial fisheries are of substantial economic importance, the Washington Department of Fish and Wildlife and the Northwest Indian Fisheries Commission—a consortium of Western Washington treaty tribes—jointly manage the state's fishery resources.[56]

The Oregon Department of Fish and Wildlife has promulgated special regulations to protect the Indian treaty fishery on the Columbia River. The regulations provide for tribal subsistence fishing, ceremonial fishing, and treaty commercial fishing in the Columbia River and its tributaries, and are specifically intended to protect off-reservation fishing rights guaranteed by four separate Indian treaties.[57]

Montana passed a law recognizing that "it appears to be to the common advantage of the state and Indian tribes to cooperate in matters involving hunting and fishing."[58] To that end, Montana established a state-tribal cooperative board with the Flathead, Kootenai, and Upper Pend Oreille Indian nations to develop hunting and fishing regulations; to allow Indians to hunt and fish off-reservation on open and unclaimed lands without licenses, permits or stamps; in other instances, issuing joint licenses, permits and stamps; to provide for joint enforcement of fish and game laws and regulations; and to afford full faith and credit to any tribal court judgment for a fish and game violation.[59]

Moreover, Florida recently passed a statute specifically recognizing the treaty right of the Miccosukee and Seminole tribes to hunt, fish and trap for subsistence within the Big Cypress Reserve.[60]

California created a pilot project to "involve and encourage the efforts of the State of California and the Covelo Indian Community of the Round Valley Indian Reservation to reach a mutual agreement regarding the legal framework for the exercise of Indian subsistence fishing in the boundary streams of the historic 1873 Round Valley Indian Reservation."[61] Another provision of the California Fish and Game Code provides for resolution of long-standing jurisdictional disputes over fisheries resources in the Klamath River Basin with the Klamath River Indian tribes.[62]

The Arizona Game and Fish Department entered into agreements with nine Indian nations concerning a host of fish and wildlife management issues including cooperative wildlife law enforcement;[63] hunting per-

mits;[64] habitat management;[65] and wildlife management.[66]

Maine has developed a Comprehensive Wildlife Conservation Strategy in coordination with federal and state agencies, conservation groups, the Penobscot Nation, Passamaquoddy Tribe, Houlton Band of Maliseet Indians, and Aroostook Band of Mic Mac Indians.[67]

VII. Conclusion

New York can learn from the successful experiences of its sister states in finding a balance between Indian treaty rights and resource conservation. In fact, New York has recently taken several initial steps toward building a more productive relationship with the Haudenosaunee. For example, New York Attorney General Eliot Spitzer sponsored a Conference on Native Americans and the Environment, the first of its kind in New York.[68] The two-day conference brought together representatives of Indian nations and state environmental officials, and provided a forum for discussion of a wide range of environmental issues of concern to both Indian nations and the State, including off-reservation hunting and fishing rights. Additionally, in 1999, DEC instituted an environmental justice program, which included the appointment of a new environmental justice coordinator and two new staff positions.[69] DEC also created an Environmental Justice Advisory Group which submitted a detailed report to the DEC Commissioner in 2002 setting forth recommendations for ensuring that DEC programs are responsive to environmental justice concerns.[70] In 2003, DEC issued its final Environmental Justice Policy.[71] Although the Policy does not specifically address Haudenosaunee concerns regarding off-reservation hunting and fishing rights, it marks a positive first step in addressing issues of importance to communities, such as the Haudenosaunee, which have historically been excluded or bypassed during the environmental permitting process.

Given these recent positive developments, it is possible that reasonable accommodations can be made by New York to allow, for example, out-of-season taking of deer for Haudenosaunee ceremonial purposes, subject to reasonable restrictions as to time and location and with appropriate safeguards to ensure public safety. Moreover, it can most likely be agreed that certain state regulations are not necessary to the conservation of any species and thus should not be enforced against Haudenosaunee who exercise off-reservation treaty rights.[72] By honoring the solemn guarantee of "free use and enjoyment" set forth in the Treaty of Canandaigua and adopting a more pragmatic approach to the issue of off-reservation hunting and fishing, New York can respect its history and people, while at the same time making great strides toward improving relations and understanding with New York's first citizens.

Endnotes

1. *See* III., *infra*.
2. 7 Stat. 44 (Nov. 11, 1794).
3. *See* IV., *infra*.
4. *See* V., *infra*. New York has recognized that it lacks jurisdiction over hunting, fishing and trapping taking place on Indian reservations. *See* N.Y. Environmental Conservation Law § 11-0707(8) (ECL) (providing that "[t]he enrolled members of an Indian tribe having a reservation located wholly or partly within the state and such other Indians as are permitted by the tribal government having jurisdiction over such reservation may hunt, fish, [and] trap upon such reservation subject only to rules, regulations and fish and wildlife laws established by the governing body of such reservation").
5. Although this article focuses on the confirmation and recognition of Haudenosaunee aboriginal hunting and fishing rights by the Treaty of Canandaigua, it is not intended to suggest that the Treaty is the sole source of such rights. Aboriginal hunting and fishing rights beyond those recognized by the Treaty of Canandaigua, as well as rights recognized by other treaties, provide additional legal grounds for assertion of Haudenosaunee hunting and fishing rights. However, other legal sources of Haudenosaunee hunting and fishing rights are beyond the scope of this article.
6. Most scholars believe that the Iroquois Confederacy was established by 1600 and may have been formed as early as 1400. The Confederacy originally included the Mohawks, Oneida, Onondaga, Cayuga and Seneca. The Tuscarora became the sixth nation by 1722, after fleeing colonial slave hunters in their North Carolina homelands and taking refuge under the protection of the Confederacy. *See* The Six Nations of New York: The 1892 United States Extra Census Bulletin vii-viii (Robert W. Venables intro., 1995) (1892) [hereinafter Venables]. The Confederacy was a political and cultural alliance that provided a vehicle for joint action by its members on matters of diplomatic importance, but which preserved the autonomy and diversity of its members. *See* William N. Fenton, *Structure, Continuity and Change in the Process of Iroquois Treaty Making*, *in* The History and Culture of Iroquois Diplomacy 9, 14-18 (Francis Jennings et al. eds., 1985) [hereinafter Jennings].
7. Although there were formerly six member nations of the Iroquois Confederacy, the descendants of the Confederacy Senecas are now part of two New York Seneca nations that are separately recognized.
8. The longhouse was the traditional dwelling place of the Haudenosaunee people. The longhouse was a multifamily dwelling constructed with a wood frame, rafters and an arched roof, and weatherproofed with large sheets of bark. *See* Venables, *supra* note 6, at viii. The name Haudenosaunee not only evokes the communal spirit of the longhouse, but also serves as a metaphor for the Confederacy that extended across much of what is now northern and western New York State. According to the traditional Haudenosaunee view, the Mohawks are the Keeper of the Eastern Door of this longhouse; the Seneca are the Keepers of the Western Door; and the Onondaga Nation is the keeper of the central hearth and fire, where the Grand Council of the Confederacy meets. *Id*.
9. 25 C.F.R. § 83.2.
10. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298-03 (March 13, 2000). For example, Seneca governance is split between the Tonawanda Seneca Nation, a traditional Haudenosaunee government that is also federally recognized and exercises exclusive authority over the Tonawanda Seneca Reservation near Buffalo, and the Seneca Nation of Indians of New York, a non-traditional federally recognized government with authority over the Seneca reservations at Cattaraugus and Allegheny.

11. The Cayuga have long been without reservation lands and, as a result, many Cayuga reside on the Seneca reservations. Recently, however, the Cayuga Nation purchased a 70-acre organic farm within their aboriginal homeland, as recognized by the Treaty of Canandaigua, which they hope will form the nucleus of a Cayuga homeland.

12. N.Y.S. Dept. of Transportation Geographic Information System, Minor Civil Divisions Coverage.

13. *Id*. *See also* Akwesasne St. Regis Mohawk Reservation, Akwesasne and Vicinity, *at* <http://www.racquetteriver.org/akwesasnemap.htm>.

14. *See* Venables, *supra* note 6, at vii.

15. *See* Robert W. Venables, *Some Observations on the Treaty of Canandaigua*, *in* Treaty of Canandaigua 1794: 200 Years of Treaty Relations Between the Iroquois Confederacy and the United States 95 (G. Peter Jemison & Anna M. Schein eds., 2000).

16. The Constitution of the Iroquois Nations: The Great Binding Law: Gayanashagowa ¶ 57, *available at* <http://www.indigenouspeople.net/iroqcon.htm>.

17. *Glossary of Figures of Speech in Iroquois Political Rhetoric*, *in* Jennings, *supra* note 6, at 117.

18. Lisa D. Chartrand, Accommodating Indigenous Legal Traditions 8 (Mar. 31 2005) (unpublished paper for the Indigenous Bar Association in Canada), *available at* <http://www.indigenousbar.ca/pdf/ Indigenous%20Legal%20Traditions.pdf> (quoting John Borrows, Indigenous Legal Traditions in Canada 10 (Mar. 2005) (unpublished paper for IBA/CBA Forum on Indigenous Legal traditions)).

19. The significance of the Treaty's identification of the Indian signatories to the Treaty of Canandaigua as the Six Nations is often overlooked. As stated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832), the use of the term "nation" is not a matter of mere convenience or shorthand, but an explicit recognition of sovereign status:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. *Id.* at 556-57.

The Chief Justice went on to note:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. *Id.* at 559.

20. *See Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 486 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004).

21. *Id*.

22. *Id*.

23. *Id*. at 487-88.

24. 7 Stat. 44.

25. *Id*. The lands occupied by the Tuscarora and Oneida nations (as well as the Onondaga, Seneca and Cayuga) had previously been recognized in the 1784 Treaty of Fort Stanwix and the 1789 Treaty of Fort Harmar. *See* 7 Stat. 15 (Oct. 22, 1784) (providing that the Tuscarora and Oneida nations "shall be secured in the possession of the lands on which they are settled."); 7 Stat. 33 (Jan. 9, 1789) (stating that the Tuscarora and Oneida were "again secured and confirmed in the possession of their respective lands"). This earlier explicit recognition of the lands occupied by the Tuscarora and Oneida was apparently a reward for the participation by those nations on the colonial side in the Revolutionary War. *See* David Landy, *Tuscarora Among the Iroquois*, *in* 15 Handbook of North American Indians: Northeast 520 (B.G. Trigger ed., 1978) ("most [Tuscarora] were sympathetic to the Americans and fought on that side in the first years of the war."); *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1152 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) (Treaty of Fort Stanwix had as its purpose to "assur[e] protection to the two Iroquois nations that had sided with the United States [during the Revolution]—the Oneidas and the Tuscaroras.").

26. 7 Stat. 44, 45 (emphasis added).

27. *Id*. (emphasis added).

28. Indeed, a contrary interpretation would violate the fundamental canon of Indian treaty construction that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (holding that "the language [in Treaty that lands reserved to tribe were] 'to be held as Indian lands are held' includes the right to fish and to hunt," because it was "their way of life."); *Worcester v. Georgia*, 31 U.S. 515, 553 (1832) ("Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other."); *see also People v. LeBlanc*, 248 N.W.2d 199, 205 (Mich. 1976) (holding treaty language reserving to Indians "the right of hunting on the lands ceded, with the other usual privileges of occupancy" was understood by Indians to include the right to fish). Here, there can be no doubt that the Six Nations would have understood "free use and enjoyment" to include the right to hunt and fish, activities that were basic to their way of life and survival.

29. *See* William Savery, *The Canandaigua Treaty Excerpt from the Journal*, *reprinted from* A Journal of the Life, Travels, and Religious Labors of William Savery, a Minister of the Gospel of Christ, of the Society of Friends, Late of Philadelphia (Jonathan Evans ed., 1873), *in* Treaty of Canandaigua 1794: 200 Years of Treaty Relations Between the Iroquois Confederacy and the United States 278 (G. Peter Jemison & Anna M. Schein eds., 2000) (Recounting that Timothy Pickering, the lead negotiator for the United States, observed "that the Indians shall have the right of hunting on these lands, as well as on all those ceded at the treaty of Fort Stanwix; and on all other lands ceded by them since the [1783 Treaty of Paris]; and their settlements shall remain undisturbed.").

30. *People v. Redeye*, 78 Misc. 2d 834, 835 (Cattaraugus County Ct. 1974) ("Although that Treaty did not contain a specific reference to hunting and fishing rights, legal authorities have held universally that the existence of such rights is not to be conditioned on their explicit mention in Federal treaties and statutes.").

31. *People v. Thomas* (Oswego County 1999); *People v. Thomas* (Oswego County 1997); *People v. Pyke* (St. Lawrence County 1988).

32. *People v. Stout* (Onondaga County 2002); *People v. Jones* (Onondaga County 1995).

33. *People v. Wolf* (Oswego County 1996).

34. *People v. Halftown* (Cattaraugus County 1996).

35. *People v. Lazore* (St. Lawrence County 2005); *People v. Fox* (St. Lawrence County 2005); *People v. David* (St. Lawrence County 2005); *People v. Hearne* (St. Lawrence County 1997); *People v. Benedict* (St. Lawrence County 1997).

36. *People v. Thompson* (St. Lawrence County 2002).

37. *Lazore*; *Fox*; *David*.

38. *Lazore*; *Fox*; *David*.

39. *People v. Patterson*, 5 N.Y.3d 91 (2005), *cert. denied*, __ U.S. __, 126 S. Ct. 1045 (2006). In *Patterson*, the defendant was an enrolled citizen of the Tuscarora Indian Nation who was cited for failing to have his name and address on a piece of ice-fishing equipment while fishing in Wilson Tuscarora State Park. At trial, defendant appeared *pro se* and testified in his defense that he was fishing at Wilson Tuscarora State Park pursuant to rights guaranteed to him by the Treaty of Canandaigua. He further testified that the prosecution was barred by the conservation necessity doctrine. *See* VI.A., *infra*. Following trial, the defendant was convicted and sentenced to pay a $25 fine. Defendant appealed his conviction and eventually reached the New York Court of Appeals, which affirmed the conviction. The court held that any Tuscarora off-reservation fishing rights in Wilson Tuscarora State Park under the Treaty of Canandaigua were extinguished when the Seneca Nation sold the lands at issue in a subsequent treaty. The decision is remarkable in that it significantly departs from long-settled principles of Indian treaty construction. However, discussion of the legal issues raised by the Court of Appeals' decision in *Patterson* is beyond the scope of this article.

40. *Requirement for Native Americans to Obtain Sporting Licenses*, memorandum from Major C.D. Johncox, to Captains Bobsein, Erickson & Gerould (Apr. 6, 2002) (requiring "enforcement staff of the Department [of Environmental Conservation] to honor official [Haudenosaunee] enrollment cards for purposes of hunting and fishing on all [off-reservation] lands and waters rather than require the legally established free licenses otherwise provided for.").

41. *See, e.g.*, *Jones*; *Stout*.

42. U.S. Const. art. VI, cl. 2; *Antoine v. Washington*, 420 U.S. 194, 204 (1975).

43. *Fellows v. Blacksmith*, 60 U.S. 366, 372 (1857) (holding that "[an Indian] treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land."); *see also County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."). *See also United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) (stating, "the Constitution declares a[n Indian] treaty to be the supreme law of the land."); *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 146 (N.D.N.Y. 2002) ("[A]ny rights [in Indian land] possessed by [New York] State prior to ratification of the Constitution 'were ceded by the State to the federal government by the State's ratification of the Constitution.'").

44. U.S. Const. art. I, § 8; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Antoine*, 420 U.S. at 203.

45. 315 U.S. 681 (1942).

46. *Id.* at 684 (emphasis added).

47. 391 U.S. 392, 398-99 (1968).

48. 414 U.S. 44 (1973).

49. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

50. *Id.* at 342 (emphasis added).

51. *Id*.

52. *Id.* The practical effect of these requirements was explained by the Court: "The state having the burden of proof as above indicated, no regulation applied to off reservation treaty fishing can be valid or enforceable unless and until it has been shown reasonable and necessary to conservation as above defined. The arrest of . . . a treaty right fisherman under a regulation not previously established to be reasonable and necessary for conservation, is unlawful. . . . If alternative means and methods of reasonable and necessary conservation regulation are available, the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish." *Id.*

53. 420 U.S. 194 (1975).

54. *Id*. at 207 (citations omitted; emphasis in original).

55. *See, e.g.*, *United States v. Williams*, 898 F.2d 727, 729 (9th Cir. 1990) ("Before a state can apply its conservation laws to Indians who have acquired treaty rights to hunt and fish the state must establish that its laws are necessary for conservation purposes."); *United States v. Sohappy*, 770 F.2d 816, 823 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986) ("a *State* prosecuting an Indian treaty fisherman for violating a state fishing regulation must establish that the regulation is reasonable and necessary for conservation purposes."); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981) (holding, "if Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it."); *Oregon. v. Jim*, 725 P.2d 372, 373 (Or. 1986) (explaining, "state regulation of Indian hunting and fishing must yield to Indian rights secured by a federal treaty."); *Washington. v. Miller*, 689 P.2d 81, 86 (1984) (stating regulation of off-reservation treaty fishing by Indians must be "reasonable and necessary for conservation."); *Wisconsin. v. Peterson*, 297 N.W.2d 52, 53 (Wis. 1980) (explaining a state can enforce fishing regulations against Indians fishing off reservation "if it can show that the enforcement of the regulations against Indian fishermen is reasonable and necessary to prevent a substantial depletion of the fish supply."); *People v. LeBlanc*, 248 N.W.2d 199, 213-14 (Mich. 1976) (holding that a state regulation of Indian fishing must be a necessary conservation measure, the least restrictive alternative method available for preserving fisheries, and must not discriminate against Indians).

56. *See* Washington Dep't of Fish and Wildlife, 2005-6 State/Tribal Agreed-To Fisheries Document, *available at* <http://wdfw.wa.gov/fish/tribal/2005-06agreement.pdf>.

57. Or. Admin. R. §§ 635-041-0005 to 635-041-0075.

58. Mont. Code Ann. § 87-1-228(1).

59. *Id.* § 87-1-228.

60. Fla. Stat. § 285.09.

61. Cal. Fish & Game Code § 16000(e).

62. *Id.* §§ 16500-16541.

63. Coop. Agreement Between Arizona Game & Fish Dep't & San Carlos Apache Tribe (1991); Coop. Agreement Between Arizona Game & Fish Dep't & Fort Mojave Tribe (1988).

64. Coop. Agreement Between Arizona Game & Fish Dep't & Hualapai Tribe (1975); Coop. Agreement Between Arizona Game & Fish Dep't & San Carlos Apache Tribe (1975); Coop. Agreement Between Arizona Game & Fish Dep't & White Mountain Apache Tribe (1975). A listing of the above agreements is available at <http://www. indianaffairs.state.az.us/agreements/gamefish.html>.

65. Memorandum of Understanding Between Arizona Game & Fish Dep't & Kiabab Paiute Tribe (1995); Memorandum of Understanding Between Ariz. Game and Fish Dep't and Navajo Nation (1992); Memorandum of Understanding Between Arizona Game & Fish Dep't & Hualapai Tribe (1991); Memorandum of Understanding Between Arizona Game & Fish Dep't & San Carlos Apache Tribe (1991). A listing of the above agreements is available at <http://www.indianaffairs.state.az.us/agreements/gamefish.html>.

66. Service Agreement Between Ariz. Game & Fish Dep't & San Carlos Apache Tribe (Bat Inventory Project and Training) (1998); Memorandum of Understanding Between Ariz. Game & Fish Department & White Mountain Apache Tribe (Predator Management) (1997, 2000); Collection Agreement Between Ariz. Game & Fish Dep't & Fort McDowell Apache Tribe (Bald Eagle Nest Watch Program) (1996); Collection Agreement Between Arizona Game & Fish Dep't & Navajo Nation (Riparian and Breeding Bird Inventory) (1992); Coop. Agreement Between Arizona Game and Fish Department and San Carlos Apache Tribe (Mountain Lion Research) (1991); Cooperative Agreement Between Arizona Game & Fish Dep't & Ute Tribe (Merriam Turkey Trapping and Transportation) (1966). A listing of the above agreements is available at <http://www.indianaffairs.state.az.us/agreements/gamefish.html>.

67. Maine's Comprehensive Wildlife Conservation Strategy: Chapter 8, 3 (Sept. 2005), *available at* <http://mainegov-images.informe.org/ifw/wildlife/compwildlifestrategy/pdfs/chapter8.pdf>.

68. Attorney General's Conference on Native Americans the Environment in New York State, Blue Mountain Lake, New York (October 2000).

69. Press Release, Dep't of Envtl. Conservation, DEC To Implement Environmental Justice Program (Oct. 4, 1999), *available at* <http://www.dec.state.ny.us/website/press/pressrel/1999/99x146.html>.

70. N.Y.S. Envtl. Justice Advisory Group, Recommendations for the New York State Department of Environmental Conservation Environmental Justice Program (Jan. 2, 2002), *available at* <http://www.dec.state.ny.us/ website/ej/ejfinalreport.pdf>; Press Release, Dep't of Environmental Conservation, Environmental Justice Advisory Group Issues Recommendations: Effort Seeks to Boost Minority and Low-Income Community Involvement in DEC's Permit Process (Jan. 3, 2002), *available at* <http://www.dec.state.ny.us/website/press/pressrel/2002/2002x01.html>.

71. Dep't of Environmental Conservation, CP–29: Environmental Justice and Permitting (Mar. 19, 2003), *available at* <http://www.dec.state.ny.us/website/ej/ejpolicy.pdf>; Press Release, Dep't of Environmental Conservation, DEC Releases Final Environmental Justice Policy: Initiative Will Provide Assistance to Underserved Communities in Permitting Process (Mar. 19, 2003), *available at* <http://www.dec.state.ny.us/website/press/pressrel/2003/2003x27.html>.

72. Although, as was the case in *Patterson*, disagreement may arise as to the precise boundaries of areas where Haudenosaunee off-reservation rights exist, such issues are best resolved through negotiation rather than case-by-case litigation. *See* 5 N.Y.3d 91.

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Global Warming: An International Human Rights Violation? Inuit Communities Petition at the Inter-American Commission on Human Rights

By Eleanor Stein

On December 7, 2005, as signatories to the United Nations Framework Convention on Climate Change (UNFCCC) and to its Kyoto Protocol were meeting in Montreal to discuss the implementation of these international instruments, Inuit[1] from Canada and Alaska filed the "Petition to the Inter[-]American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States" ("Petition").[2] This dramatic document details the devastating impact on Inuit land, property, culture, and life caused by the rapid warming of the Arctic region. Drawing extensively on the 2004 Arctic Climate Impact Assessment ("ACIA" or "Assessment"),[3] the Petition documents what the world's climate scientists agree: the emissions of greenhouse gases, in particular carbon dioxide (CO_2) from the burning of fossil fuels over the last 150 years of industrial activity have resulted in a one-third increase in the concentration of CO_2 in the earth's atmosphere. This concentration produces significant earth and ocean warming presaging the obliteration of the frozen Arctic.

A. Background: The Report on Arctic Warming and its Impact on Indigenous Culture

The signs of warming—bearing out scientific predictions—are now inescapable. The year 2005 was the warmest year since temperatures have been recorded.[4] The authoritative 2004 Assessment concluded that nowhere on earth has the effect of the increase in CO_2 concentration been so disruptive as in the Arctic, which "experienced the greatest regional warming on earth in recent decades."[5] Twice the predicted global climate temperature increase is forecast for the Arctic. Among the impacts already observed are: decrease in snow, deterioration of ice, and melting permafrost triggering landslides and severe erosion. These changes are causing degradation of habitat and health of Arctic species, including polar bears, ice-living seals, walrus, and some marine birds. Human health impacts include skin cancer, immune system disorders, cataracts, heat-related health problems, and increased dependency on "store food," less healthy than the traditional diet.

The Petition details the deterioration of the living conditions for indigenous Inuit who remain in their ancestors' villages.[6] On the coast, for example, erosion has rendered Inuit villages subject to imminent destruction. Formerly protected by year-round barriers of ice and constructed on a base of permafrost,[7] these villages are now prey to destruction by winter storms.

"The signs of warming—bearing out scientific predictions—are now inescapable."

As of the 1990s, indigenous people represented roughly 10% of the total Arctic population, although roughly half the Canadian and the majority of the Greenland Arctic population are indigenous.[8] The Inuit describe the intimate relationship between land, climate, and culture, defining the Greenland Inuit word for weather, "*sila*":

> to mean "the elements" or "the air." But *sila* is also the word for "intelligence/consciousness," or "mind" and is understood to be the fundamental principle underlying the natural world. *Sila* is manifest in each and every person. It is an all-pervading, life-giving force—the natural order, a universal consciousness, and a breath soul. *Sila* connects a person with the rhythms of the universe, integrating the self with the natural world. As *sila* links the individual and the environment, a person who lacks *sila* is said to be separated from an essential relationship with the environment that is necessary for human well-being.[9]

The Assessment, the product of an international scientific effort that also integrated irreplaceable indigenous traditional knowledge, concluded that warming is "likely to disrupt or even destroy [Inuit] hunting and

food sharing culture as reduced sea ice causes the animals on which they depend to decline, become less accessible, and possibly become extinct."[10] The conclusion is that these changes threaten the survival of indigenous Arctic cultures.

B. The Inuit Petition

1. The Basis for Asserting U.S. Responsibility for Climate Change

The Petition asserts that, as a matter of provable science and fact, these climate effects are attributable, in very significant part, to actions, policies, and omissions of the United States. This theory of liability rests on two interrelated factors: first, the U.S. today contributes the greatest proportion of greenhouse gas emissions in the world; and second, the U.S. has refused to join the world community in crafting mandatory emission controls or other effective remedies. In particular, the U.S. has refused to ratify the Kyoto Protocol to the U.N. Framework Convention on Climate Change or adopt effective domestic policies to reduce CO_2 emissions.[11]

The 2004 United States Department of Energy's Energy Information Administration report states that "carbon dioxide emissions from the [U.S.] electric power sector have grown by 27.5 percent since 1990, while total carbon dioxide emissions from all energy-related sources have grown by 16.0 percent. Carbon dioxide emissions from the electric power sector represented 39.4 percent of total U.S. energy-related carbon dioxide emissions in 2003."[12] The U.S., with roughly six percent of the world's people, contributes 24 precent of the world's total energy-related greenhouse gas emissions. The industrialized world as a whole contributes approximately 49 percent of the world's total greenhouse gas emissions, putting the U.S. share at half of the total share of industrialized nations.[13]

2. The Inuit Claim Indigenous Rights Under International Law

The Petition invokes the human and, specifically, indigenous rights principles of international law. As a member of the Organization of American States (OAS), the U.S. has accepted the American Declaration of the Rights and Duties of Man. The legal argument advanced for U.S. responsibility is that, although the U.S. is not a party to the American Convention on Human Rights, its OAS membership and acceptance of the American Declaration bind it as a matter of both international human rights and United States federal law.[14] Other authority in international law recognizing the special protections due to indigenous peoples includes the International Labour Organization Convention No. 169, providing that states will safeguard indigenous rights to traditional lands,[15] guaranteeing indigenous peoples access to and input in the planning process,[16] requiring studies to assess the impact of actions upon indigenous ways of life,[17] and assuring that indigenous peoples should benefit when possible from the use of their land.[18]

The United States is a party to the International Covenant on Civil and Political Rights (ICCPR), the binding instrument giving effect to the Universal Declaration of Human Rights, crafted immediately after the end of World War II with the express intention of establishing international human rights norms in the wake of the rise, war against, and defeat of genocidal Nazism.[19] The United States Supreme Court recently held that the ICCPR "does bind the United States as a matter of international law."[20]

Commentators note that environmental insults may affect indigenous communities disproportionately, where indigenous culture is dependent upon or tied to "their immediate environment for survival."[21] Advocates have asserted to the Inter-American Commission on Human Rights (IACHR) the need for special protection of indigenous people. In several cases, the Commission has heard petitions and initiated investigations at the behest of indigenous petitioners. Among these is the 2002 Commission conclusion, acting on the petition of cattle ranchers Mary and Carrie Dann, members of the Western Shoshone, that the U.S. Indian Claims Commission procedures and decision extinguishing Western Shoshone aboriginal title rights, as applied to the Dann sisters, "were not sufficient to comply with contemporary human rights norms, principles and standards that govern the determination of indigenous property interests."[22] In the *Dann* case, the IACHR concluded that the U.S. "failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone lands."[23] The Commission recommended that the United States provide the Danns with an effective remedy, including adopting legislation or other measures to ensure their property rights in Western Shoshone ancestral lands, and more broadly, to review its laws and practices "to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration."[24]

Similarly, in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACHR filed before the Inter-American Court of Human Rights an application against Nicaragua for relief on behalf of the indigenous Awas-Tingni people. The Commission requested, among other relief, that the Court declare that Nicaragua must establish legal procedures to recognize indigenous property rights. The Court held that Nicaragua had improperly granted logging rights to traditional indigenous peoples' lands in violation of the American Convention.[25]

C. Conclusion

The Inuit proclaim that they seek dialogue, rather than confrontation, with the United States. The relief the Inuit request of the Commission is an on-site investigation; a hearing; and a report declaring that the U.S. is internationally responsible for violations of the American Declaration of the Rights and Duties of Man, among other international instruments. The Inuit also seek a Commission recommendation that the U.S. adopt mandatory measures to limit greenhouse gases in cooperation with other nations, pursuant to the UNFCCC; that it take into account the Arctic impacts before approving all major government actions; that it implement a plan, in coordination with the Inuit, to protect Inuit culture and resources, and mitigate harm, and to provide assistance to the Inuit to adapt to unavoidable climate change.[26]

And Sheila Watt-Cloutier, the elected Chair of the Inuit Circumpolar Conference and lead petitioner, seeks support from the world community in defending Inuit culture:

> Inuit are an ancient people. Our way of life is dependent on the natural environment and animals. Climate change is destroying our environment and eroding our culture. But we refuse to disappear. We will not become a footnote to globalization. . . . Climate change is amplified in the Arctic. What is happening to us now will happen soon in the rest of the world. . . . As well, I invite governments and non-governmental organizations worldwide to support our petition and to never forget that, ultimately, climate change is a matter of human rights.[27]

For Americans, her call for support raises profound questions about our enjoyment of wealth and comforts based upon a fossil-fuel economy. As the Assessment reminds us, "[t]he imposition of climate change from outside the region can also be seen as an ethical issue, in which people in one area suffer the consequences of actions beyond their control and in which beneficial opportunities may accrue to those outside the region rather than those within."[28]

Endnotes

1. Inuit, the word for "people" in the Inuktitut language, refers to the linguistic and cultural descendants of the Thule and Dorset peoples in Russia, Alaska, Canada, and Greenland. *See* Petition to the Inter[-]American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 1 (Dec. 2005), *available at* <http://www.ciel.org/Publications/ICC_Petition_7 Dec05.pdf> [hereinafter Petition]. Inuit are defined by "a common culture characterized by dependence on subsistence harvesting in both the terrestrial and marine environments, sharing of food, travel on snow and ice, a common base of traditional knowledge, and adaptation to similar Arctic conditions." *Id.* The Inuit trace cultural roots back 1,000 to 1,600 years, dating from the birth of whale hunting technology. *Id.* at 14. Although some Inuit consider the term "Eskimo" pejorative, it is used in some instances in the Petition because it is recognizable to Western cultures. *Id.* at 13.
2. The Center for International Environmental Law (CIEL) and Earthjustice collaborated in the filing of this Petition.
3. Arctic Climate Impact Assessment Report (2005), *available at* <http://www.acia.uaf.edu/pages/scientific.html> [hereinafter Assessment]. The ACIA is a collaborative scientific project of the Arctic Council, an intergovernmental forum of the eight arctic nations (Canada, Denmark/Greenland/Faroe Islands, Finland, Iceland, Norway, Russia, Sweden, and the U.S.), six indigenous peoples organizations (Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Conference, Russian Association of Indigenous Peoples of the North, and Saami Council), as well as official, scientific, and non-governmental observers. *Id.* at iii; *see also generally* Susan Joy Hassol, Impacts of a Warming Arctic: The Arctic Climate Impact Assessment (2004), *available at* <http://amap.no/acia/> [hereinafter Impacts].
4. James Hansen et al., NASA Goddard Institute for Space Studies, GISS Surface Temperature Analysis–Global Temperature Trends: 2005 Summation (2005), *available at* <http://data.giss. nasa.gov/gistemp/2005/>.
5. Assessment, *supra* note 3, at 3.
6. *See, e.g.*, Petition, *supra* note 1, at 2-6.
7. Permafrost is defined as "soil, rock, sediment, or other earth material with a temperature that has remained below 0º C for two or more consecutive years. Permafrost underlies most of the surfaces in the terrestrial Arctic." Assessment, *supra* note 3, at 209.
8. Impacts, *supra* note 3, at 7.
9. Petition, *supra* note 1, at 18.
10. *Id.* at 4-5 (*citing* ACIA).
11. *Id.* at 6. The United Nations Framework Convention on Climate Change (UNFCCC) states as its objective: "to achieve … stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." United Nations Framework Convention on Climate Change art. 2 (May 9, 1992), *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf>. The UNFCCC includes commitments by each developed country party to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." *Id*. art. 4 (2)(a) (footnote omitted).
12. Energy Information Admin., United States Dep't of Energy, Emissions of Greenhouse Gases in the United States 2003 xii (2004), *available at* <http://www.eia.doe.gov/oiaf/ 1605/gg04rpt/pdf/057303.pdf>.
13. *Id.* at 2.
14. Petition, *supra* note 1, at 5-7, 70. *See also State of Connecticut v. American Electric Power*, No. 04 Civ. 5669, 2005 U.S. Dist. LEXIS 19964 (S.D.N.Y. Sept. 15, 2005). In her decision, Judge Preska dismissed the complaints of eight states' attorneys general and the City of New York, and the companion complaint filed by the Open Space Institute, among others, that sought to hold defendant energy companies liable for their alleged contributions to the global warming problem, on the ground that at issue were

nonjusticiable political questions concerning U.S. government foreign and energy policy, including a comprehensive list and history of government policies such as declining to ratify the Kyoto Protocol, refusing to regulate CO_2 as a category pollutant pursuant to the Clean Air Act, and other dimensions of federal energy policy. *Id.*

15. International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries, No. C169 art. 14(1) (1989), *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm>.
16. *Id.* art. 6, 7.
17. *Id.* art. 7(3).
18. *Id.* art. 15.
19. International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1996, 999 U.N.T.S. 171.
20. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). The Court held, however, that the Convention was ratified by the U.S. "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.*
21. David Hunter et al., International Environmental Law and Policy 1283 (2002).
22. *Mary and Carrie Dann, United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, § IV(D)(139) (Dec. 27, 2002), *available at* <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>.
23. *Id.* § I(5).
24. *Id.* § VI(173). In that case, the U.S. rejected the IACHR recommendation and, according to the Dann sisters, subsequently 40 armed federal agents seized 225 head of their cattle grazing on the disputed lands and sold them at auction, notwithstanding the Commission's request that the U.S. return the cattle. *Id.* § VIII(179).
25. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser.C) No. 79, § XII (2001), *available at* <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>.
26. Petition, *supra* note 1, at 118.
27. *See generally* Press Release, Inuit Circumpolar Conference, Inuit Petition Inter-American Commission on Human Rights to Oppose Climate Change Caused by the United States of America (December 7, 2005), *available at* <http://www.inuitcircumpolar.com index.php?ID=316&Lang=En>.
28. Assessment, *supra* note 3, at 4.

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Free Exercise Claims of Incarcerated Indians: Grooming Regulations and Judicial Standards

By Amy Lavine

In March of 2000, California performed its eighth execution since reinstating the death penalty in 1977.[1] Darrell Rich, who also went by the name Young Elk, was a self-admitted serial killer and was by no means a sympathetic character.[2] Yet, because he requested to cleanse his conscience by attending a sweat lodge ceremony rather than by being administered pastoral last rites, the prison warden found grounds to refuse his final request. In the warden's view, allowing Young Elk to leave the prison's maximum security area to attend the ceremony held in the prison yard would have created an unjustifiable security threat.[3] But the security concerns were weak justifications in the face of an exceptional request: Young Elk had been a model prisoner during the 22 years he spent on death row; he agreed to be shackled throughout the sweat lodge ceremony; and, most significantly, he was confined to a wheelchair due to a degenerative spinal disease—he couldn't walk, let alone wield burning rocks with his bare hands in a last ditch attempt to escape from one of the most secure facilities in the world.[4]

Why was the prison so adamantly opposed to allowing Young Elk attend the sweat lodge ceremony? Why did the governor, the district court, the Ninth Circuit, the United States Supreme Court, and the public at large refuse to intervene? This is what one commentator said the day before the execution:

> DON'T YOU just love the way vicious killers turn into sniveling cowards as their execution date nears? * * * Maybe it would be possible to believe in the killer's remorse if it weren't so over done. * * * According to [a] Cherokee Nation official . . . , sweat lodges hold no "religious significance" for Cherokees. . . . A tribal religious leader told [the official] that instead of using a sweat lodge, Rich "needs to go into himself." * * * Better yet, if Rich wants to make amends and prove his remorse, he could accept his execution as the only means to provide some solace to the survivors of his gruesome killing spree. That would show true spirituality.[5]

Such blatant hostility can be partly attributed to Young Elk's criminal past, but it also evinces a lingering mistrust of traditional Indian religious values and beliefs. As Vine Deloria, a prominent Indian scholar remarked:

> Our foremost plight is our transparency. People can tell just by looking at us what we want, what should be done to help us, how we feel, and what a "real" Indian is really like. * * * Experts paint us as they would like us to be. * * * The American public feels most comfortable with the mythical Indians of stereotypeland. * * * To be an Indian in modern American society is in a very real sense to be unreal and ahistorical.[6]

"While Indians' struggle for religious freedom pervades many areas of the law, it is nowhere more ubiquitous than in the treatment of American Indian prisoners, where intolerance and poor treatment can be easily attributed to criminal status rather than to religious identification."

This seeming "transparency" may help to explain why Young Elk's request was flatly rejected whereas a denial of more mainstream last rites would be considered unthinkable to most people. From this view, Young Elk's desire to attend a sweat lodge ceremony could be dismissed because such a ceremony is not "required" by the Cherokee faith and because, as an Indian, he could "go into himself" instead.[7] While denying Young Elk's request was permissible under prison regulations,[8] the refusal—based on exaggerated, if not pretextual concerns—showed a reluctance to take Young Elk's beliefs seriously and evidenced a more widespread societal distrust of traditional Indian spirituality.

This article examines some of the contemporary difficulties faced by Indian prisoners in asserting their First Amendment right to the free exercise of religion.[9] While Indians' struggle for religious freedom pervades many areas of the law,[10] it is nowhere more ubiquitous than in the treatment of American Indian prisoners, where intolerance and poor treatment can be easily

attributed to criminal status rather than to religious identification.[11] Like canaries in a coal mine, the vestiges of hostile and condescending attitudes toward traditional Indian religions are especially apparent in a prison environment, but because they point toward the persistence of prejudices that are often unstated, they are often ignored. For this reason, an awareness of the treatment of Indian prisoners is crucial to fostering a true acceptance and accommodation of Indians' religious and cultural beliefs. Hopefully, a more informed understanding of Indian religious values and how they relate to prison concerns can help to fairly resolve future conflicts raised by Indian prisoners.

Free Exercise Standards and Legislation

Contemporary denials of Indian religious freedom are not usually marked by the blatant disdain of native religions espoused by eighteenth and nineteenth century policies intended to "civilize" Indian tribes through Christianization.[12] Rather, difficulties in translating the significance of traditional beliefs and practices often account for the creation and maintenance of policies that burden Indians' freedom to practice their religions.[13] Additionally, as the judicial standards used to evaluate free exercise claims evolved in a Judeo-Christian context,[14] they are often ill suited to the analysis of laws having a negative impact on Indian religions that are markedly different in structure and content from more mainstream faiths.[15]

The difficulties faced by Indians who challenge the constitutionality of laws that infringe on their religious freedoms are apparent in the two leading cases[16] on Indian free exercise claims. *Lyng v. Northwest Indian Cemetery Protective Association* concerned Indian objections to timber harvesting and the construction of a road through a traditionally sacred area.[17] The Court refused to grant an injunction against the building of the road, reasoning that although it would "have devastating effects on traditional Indian religious practices," the road would not prohibit the Indians' free exercise of their religion because it would "have no tendency to coerce individuals into acting contrary to their religious beliefs."[18] While prior free exercise cases had applied a standard of strict scrutiny,[19] the Court was able to invoke a lower scrutiny by holding the road created only an "indirect coercion."[20] Thus, the Court did not require the government to provide a compelling interest for the completion of its project.

Whereas the controversy in *Lyng* involved a clash of values concerning property use,[21] *Employment Division, Department of Human Services of Oregon v. Smith* dealt with the sacramental use of peyote by members of the Native American Church.[22] As in *Lyng*, the *Smith* Court refused to invoke a compelling interest test and instead held that neutral laws of general applicability that incidentally burden the exercise of religion do not violate the Free Exercise Clause.[23] The Court acknowledged that its holding "place[d] at a relative disadvantage those religious practices that are not widely engaged in," and characterized the result as an "unavoidable consequence of democratic government."[24] This reworking of free exercise doctrine has been criticized heavily, not only for its effects on Indians but for the consequences it may entail for "adherents of other minority religions whose practices might offend the Judeo-Christian mainstream."[25]

The holdings in both *Lyng* and *Smith* relied in part on the Court's decision not to analyze the "centrality" of the religious exercises at issue.[26] While the Court's reluctance to engage in analysis that could require it to find "that some sincerely held religious beliefs and practice are not 'central to certain religions'" may be understandable, by sidestepping the issue of centrality, the Court was able to avoid deciding whether the government had substantially infringed the right to free exercise of religion.[27] As Justice Blackmun noted in his dissent in *Smith*, the sacramental use of wine was excepted from the general ban on alcohol in the statute at issue, and "[the government] could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion."[28] Implicit in this remark is the suggestion that the centrality of certain religious practices to more mainstream faiths would not be overlooked in free exercise claims, and that it would, in fact, have some influence on the Court's analysis. The Court's reluctance to bring to light the significance of the religious assertions in *Lyng* and *Smith* can therefore be understood to reflect the historical belief that Indian religions are somehow less entitled to protection than those that are of a more mainstream nature.

In response to the Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[29] The Act reinstated the strict scrutiny standard for free exercise claims, requiring any law imposing a substantial burden on religious freedom to be the least restrictive means of serving a compelling governmental interest.[30] Although RFRA attempted to provide increased protection of religious rights, the Court struck it down in 1997 as falling outside the scope of Congress's Fourteenth Amendment enforcement power.[31] Thereafter, Congress made a second attempt to provide greater protection for religious beliefs in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), this time justifying its enactment on the Commerce and Spending Clauses.[32] Providing less coverage than RFRA, RLUIPA affected only free exercise claims brought by institutionalized persons and claims relating to land-use regulations.[33]

Unlike its predecessor, the constitutionality of RLUIPA, at least insofar as it applies to institutionalized persons, was upheld against Establishment Clause objections in 2005.[34]

Prisoners' Free Exercise Claims

It has long been acknowledged that "prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[35] However, it is equally well settled that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."[36] The Court promulgated the first clear standard for evaluating prisoners' constitutional claims in its decision in *Turner v. Safley*.[37] As held in *Turner*, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[38] The Court identified certain factors that were important in determining the reasonableness of such regulations, including:

(1) whether a "valid, rational connection" exists between the regulation and the stated penological interest;

(2) whether "other avenues . . . for the exercise of the asserted right" are available to the prisoner;

(3) how and to what extent allowing the prisoner to exercise the right would affect other prisoners and the overall functioning of the institution; and

(4) whether the stated penological interests could be served by other, less restrictive, regulations.[39]

Taking into consideration the caveat that "courts are ill equipped to deal with the increasingly urgent problems of prison administration,"[40] courts faced with prisoners' free exercise claims post-*Turner* were extremely deferential to prison administrators.[41] Demonstrative of this trend were cases dealing with personal grooming regulations, one of the most frequently litigated types of inmate free exercise claim.[42] In *Standing Deer v. Carlson*, a group of Indians incarcerated in California challenged a regulation that prohibited the wearing of religious headbands in the dining hall area.[43] Specifically, the inmates argued that dismissing their claims on summary judgment was improper because the prison had provided no evidence that the regulation was necessary to avert safety and sanitation problems.[44] Opposing this assertion, the prison argued that the ban on headbands was necessary to preserve order because if some prisoners wore dirty headgear, other prisoners upset by these unsanitary conditions might become disruptive.[45] The Ninth Circuit found that no genuine issue of fact was presented by the claims, and held, "[w]e do not require that prison officials demonstrate that the prisoners' religious practices are causally related to existing institutional problems. . . . [W]e restrict our inquiry to considering whether the challenged regulation is *logically connected* to legitimate penological concerns."[46] Despite the court's decision, it nonetheless seems that the inmates' contention does raise a material issue of fact, especially, as a ban on headwear could arguably aggravate sanitary conditions by preventing inmates from covering their hair.[47]

The Eighth Circuit took a similarly deferential approach in *Iron Eyes v. Henry*.[48] In that case, Iron Eyes, a Sioux Indian incarcerated in Missouri, challenged a prison grooming regulation that required him to cut his hair because he believed cutting his hair was "an offense to the Creator."[49] Although the Eighth Circuit had previously struck down a similar provision requiring Indian prisoners to cut their hair in *Teterud v. Burns*,[50] the court used *Iron Eyes* as an opportunity to revise its position on the issue. The court's previous ruling in *Teterud v. Burns* held that less restrictive means were available to further the prison's stated interests—preventing inmates from hiding contraband and being able to impede identification by changing their appearance—than prohibiting prisoners from having long hair.[51] However, the *Iron Eyes* court interpreted *Turner* as rejecting the use of a least restrictive means analysis and thus analyzed the contested prison regulation using the highly deferential standard of review propounded in *Standing Deer*. Holding the prison's objectives as security related and therefore valid penological interests, the *Iron Eyes* court held that the asserted interests of easy identification and prevention of smuggling were rationally related to the hair length requirement.[52] Addressing the remaining *Turner* factors, the court found that adequate alternative methods of religious practice remained open to Iron Eyes,[53] and thus deferred to the prison's position that exempting Iron Eyes from the regulation would cause undue institutional difficulties.[54]

Although the *Turner* analysis easily lends itself to reaching outcomes deferential to prison administrators,[55] as demonstrated in *Standing Deer* and *Iron Eyes*, it did not completely foreclose courts from recognizing the pretextual nature of some prison regulations.[56] Regardless, the *Turner* standard was superseded in 1993 by RFRA,[57] which promised a heightened level of scrutiny for free exercise cases.[58] RFRA provided that the government could only impose a substantial burden on the free exercise of religion if the restriction was "the least restrictive means of furthering [a] compelling government interest."[59] In practice, however, RFRA often had little effect on the deference courts were willing to extend to prison administrators.[60]

In *Hamilton v. Schriro*, for example, the Eighth Circuit reversed a ruling in favor of an Indian who had challenged prison regulations on hair length and access to sweat lodges.[61] While the court acknowledged that "Congress intended for the same compelling interest test in the statute to apply to prisoners as well as non-prisoners," it nevertheless held that "the applicable test must be construed in the prison setting, giving due deference to the expert judgment of prison administrators."[62] Citing *Iron Eyes*, the *Hamilton* court held the hair length regulation was the least restrictive way to further the compelling interests of preventing prisoners from smuggling contraband in their hair and from using hairstyles to express gang affiliation.[63] However, the court failed to address evidence that the threats posed by long hair were overstated, and it neglected to explain its conclusion that less restrictive regulations, such as those considered by the same circuit in *Teterud*, did not exist.[64]

"With rising prison populations, especially of American Indians and other minorities it is crucial that the extent and unfairness of prison policies that unnecessarily restrict religious freedom are brought to light and ameliorated."

Other courts also applied the RFRA standard in a deferential manner to reach similar results as the Eighth Circuit.[65] Although RFRA was struck down in 1997, the provisions of its successor, the more limited RLUIPA, require that a similar level of scrutiny be applied to prisoners' free exercise claims.[66] Yet, like claims founded on RFRA, analyses under RLUIPA generally have not induced the application of a standard meaningfully more protective of prisoners' rights than the *Turner* test.[67] Although not especially surprising given the courts' history of accepting prison administrators' exaggeration of threats and often pretextual purposes, the continued deference showered upon correctional decision-makers is somewhat excessive. This is especially so in light of RLUIPA's, unlike RFRA's, limited application, to only two classes of free exercise claims: those concerning land use regulations and those brought by institutionalized persons.[68]

New York State Prison Regulations

New York's state prisons do not prescribe maximum hair length regulations, but require only that an inmate keep long hair tied back in a ponytail.[69] Additionally, the ponytail requirement does not apply to Native American prisoners participating in approved Native American cultural gatherings.[70] New York formerly required the cutting of all inmates' hair upon entry into the state penal system.[71] At present, Native Americans are exempt from the requirement that all male inmates receive a haircut to a length of less than one inch when newly committed to the state prison system.[72]

However, while prison grooming regulations in New York may be favorable to Indian prisoners, they do not guarantee that Indian prisoners asserting other types of free exercise claims will be respected. Indeed, as the cases described in this article demonstrate, the judicial deference accorded to prison administrators often militates against the accommodation of non-mainstream religious practices; and it is likely that similar views are held by legislators, policy-makers, and portions of the public at large. Furthermore, these views are likely illustrative of more general attitudes toward the misconceived transparency of Indian beliefs. By highlighting and criticizing the treatment of Indian prisoners when they attempt to freely exercise their religion, society can effectively combat this problem, as the transparency often goes unseen until pointed out in its most obvious configuration.

Conclusions

With rising prison populations, especially of American Indians and other minorities,[73] it is crucial that the extent and unfairness of prison policies that unnecessarily restrict religious freedom are brought to light and ameliorated. The balance between religious rights and genuine prison-related concerns is often difficult to achieve, but that should not justify perfunctory reliance on the opinions of prison managers. Rather, the creation of inmate religious programs and the resolution of inmate free exercise claims must take into account the spectrum of religious beliefs outside the mainstream and employ meaningful standards to achieve a fair balance of religious and penological interests.

Endnotes

1. Harriet Chiang et al., *Serial Killer Dies at San Quentin: Darrell Rich 8th Inmate Executed Since State Reinstituted Death Penalty*, S.F. Chron., Mar. 15, 2000, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2000/03/15/MN36971.DTL&hw=young+elk&sn=009&sc=338>. *See also* James S. Thompson, *Dead Man Praying*, *available at* <http://www.prisonwall.org/youngelk.htm>.
2. Chiang, et al., *supra* note 1.
3. *Rich v. Woodford*, 210 F.3d 961, 964 (9th Cir. 2000) (Reinhardt, J., dissenting).
4. *See id*.
5. Debra J. Saunders, *Young Elk, Old Crimes, Ancient Justice*, S. F. Chron., Mar. 14, 2000, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2000/03/14/ED108398.DTL&type=printable> (emphasis in original).
6. Vine Deloria, Jr., Custer Died for Your Sins: An Indian Manifesto 9-10 (1969).

7. *See* Saunders, *supra* note 5.

8. *See Rich*, 210 F.3d at 963.

9. The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

10. *See, e.g., Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (regulating the ceremonial use of controlled substances [peyote]); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (restricting Indian access to sacred lands); *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting the argument that the use of social security numbers in processing applications for social welfare benefits violated Indian religious beliefs); *Hatch v. Goerke*, 502 F.2d 1189, 1194 (1974) (holding a public school's policy requiring Indian children to cut their hair "raised a substantial question of violation of federal constitutional rights").

11. Racial prejudice is also implicated in any analysis of the unequal treatment of American Indians, but it is beyond the scope of this article.

12. *See* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13, 15 (1991); s*ee generally* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 Stan. L. Rev. 773 (1997).

13. To take but one example, traditional Indian languages do not even contain a word for "religion." Rhodes, *supra* note 12, at 18.

14. *See id*. at 17; *see also Davis v. Beason*, 133 U.S. 333 (1890) (upholding a Mormon defendant's conviction for bigamy); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (involving a prohibition on the distribution of religious materials by Jehovah's Witnesses); *Sherbert v. Verner*, 374 U.S. 398 (1963) (challenging the denial of unemployment benefits to a Seventh-day Adventist for refusing to work on the Sabbath). An additional difficulty lies in the suggestion that "judges implicitly embody and radiate the (Western) values of our society and, hence, are particularly susceptible to the ethnocentric limitations of the Western ordering of the world." Rhodes, *supra* note 12, at 47.

15. *See, e.g.*, Deloria, *supra* note 6, at 124-25.

16. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

17. *Lyng*, 485 U.S. at 441.

18. *Id*. at 451, 465.

19. *See, e.g., Sherbert*, 374 U.S. at 403; *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

20. *Lyng*, 485 U.S. at 450-51.

21. Indian religions emphasize respect for land and encourage sustainability and communal use of the natural environment. Judeo-Christian religions, on the other hand, have embraced a natural law conception of private property rights that entails "productive" land use. *See generally* Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 Yale L.J. 717, 723-31 (1985). In many ways, the decision in *Lyng* reflects early United States allotment policies that regarded land as being most valuable when owned individually, and evidences a lingering inability (or unwillingness) on the part of the Court to accept traditional Indian values. *See* Joseph William Singer, *Sovereignty and Property*, 86 Nw. U.L. Rev. 1, 38 (1991).

22. *See Smith*, 494 U.S. at 874.

23. *Id*. at 878-79.

24. *Id*. at 890.

25. Rhodes, *supra* note 12, at 45.

26. *Lyng*, 485 U.S. at 457-58; *Smith*, 494 U.S. at 886-87.

27. *Lyng*, 485 U.S. at 457.

28. *Smith*, 494 U.S. at 914 n.6 (Blackmun, J., dissenting).

29. 42 U.S.C. §§ 2000bb *et seq*.; *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 2118 (2005).

30. 42 U.S.C. § 2000bb (b)(1).

31. *City of Boerne v. Flores*, 521521 U.S. 507, 532-36 (1997). U.S. 507, 532-36 (1997). RFRA remains valid as applied to functions of the federal government. *See O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400-401 (7th Cir. 2003).

32. 42 U.S.C. §§ 2000cc *et seq*.; § 2000cc (a)(2).

33. *Id.* §§ 2000cc to 2000cc-1.

34. *Cutter,* 125 S. Ct. at 2117.

35. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

36. *Id*. at 545-46.

37. 482 U.S. 78 (1987).

38. *Id*. at 89.

39. *Id*. at 89-91.

40. *Id.* at 84, *quoting*, *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

41. The tendency of courts to be deferential to prison administrators stems, in part, from the decision in *O'Lone v. Estate of Shabazz*, decided just days after *Turner*. *O'Lone*, 482 U.S. 342 (1987) (holding that prison regulations that prevented Muslim inmates from attending religious services were reasonable security measures).

42. Claims based on these types of regulations have been brought by adherents of many religious faiths, including, among others, Orthodox Jews (*Fromer v. Scully*, 874 F.2d 69 (2d Cir. 1989); *Phipps v. Parker*, 879 F. Supp. 734 (W.D. Ky. 1995)); Rastafarians (*Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990); *Scott v. Mississippi Dep't of Corrections*, 961 F.2d 77 (5th Cir. 1992)); Muslims (*Green v. Polunsky*, 229 F.3d 486 (5th Cir. 2000)); and followers of the Church of Jesus Christ Christian/Aryan Nation (*Dunavant v. Moore*, 907 F.2d 77 (8th Cir. 1990)).

43. 831 F.2d 1525, 1526 (9th Cir. 1987).

44. *Id.* at 1526-27.

45. *Id*. at 1527.

46. *Id*. at 1528 (emphasis in original).

47. Interestingly, the ban applied to all headgear, including hairnets. *Id*. at 1526. However, California food service regulations in force at that time actually required "[a]dequate head coverings must be worn by all men and women while engaged in the preparation or handling of any food product." Cal. Code Regs. tit. 17, § 12275(d).

48. *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990).

49. *Id*. at 811. Iron Eyes sought damages against prison employees who had, on two occasions, forced him to cut his hair or face severe disciplinary penalties. *Id*. Although the hair length regulation included an exemption for Indian prisoners, Iron Eyes did not seek permission to keep his hair long until after filing the lawsuit. After submitting proof of his Indian ancestry and upbringing, he was denied the exemption and was soon afterwards forced to receive a third haircut. *Id*. at 812.

50. 522 F.2d 357 (8th Cir. 1975).

51. *Id*. at 361. The *Teterud* court concluded that these interests could be adequately served without causing an unreasonable administrative burden by requiring prisoners with long hair to wear hairnets. *Id.* The prison administrators in *Teterud* also cited interests related to sanitation that were not addressed by the *Iron Eyes* court. *See id*.; *Iron Eyes*, 907 F.2d at 814.

52. The court held the interests and regulation were rationally related, despite Iron Eyes's contentions that his identification photo had not been updated after his hair was cut and that smuggling could be easily accomplished through a variety of other means. 907 F.2d at 813-15. Although the prison had denied Iron Eyes' application for an exemption from the grooming regulation, that issue was not before the court, and it was therefore able to find that the prison's interests were not discriminatory and thus complied with the *Turner* requirement of legitimacy. *Id*. at 814.

53. *Id*. at 814-15. The assumption that Iron Eyes could practice his religion by attending pipe ceremonies and sun dances exemplifies the difficulty many non-Indians have in understanding that Indian religious beliefs permeate aspects of everyday life. This type of integrated belief is largely unfamiliar to mainstream religions that separate distinct religious rites and functions from secular activity. As a result of this misunderstanding, Indian practices are often considered "cultural" rather than religious. *See* Dussias, *supra* note 12, at 806-7.

54. *Iron Eyes*, 907 F.2d at 815-16. The discussion of the last two *Turner* factors did not include any analysis of the court's previous decision in *Teterud*, where it found that less restrictive means were available and would not unduly burden prison administration. *See id*. at 816-23 (Heaney, J., dissenting).

55. Hair length regulations were repeatedly upheld against challenges brought in other courts as well. *See, e.g., Pollock v. Marshall*, 845 F.2d 656 (6th Cir. 1988); *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991).

56. *See, e.g., Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988) (remanding for consideration of whether the hair length policy had a discriminatory purpose); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990) (holding policy requiring Rastafarian dreadlocks be cut upon admission to institution unconstitutional); *Mosier v. Maynard*, 937 F.2d 1521 (10th Cir. 1991) (reversing dismissal of Indian prisoner's claim regarding hair length regulation exemption because genuine issues of fact were raised as to the reasonableness of the exemption's requirements).

57. 42 U.S.C. §§ 2000bb *et seq*.

58. *Id.* § 2000bb(b)(1).

59. *Id*. § 2000bb-1(b)(2).

60. *See* Dussias, *supra* note 12, at 842.

61. 74 F.3d 1545 (8th Cir. 1996).

62. *Id*. at 1552.

63. *Id*. at 1554-55.

64. *See generally id*. at 1557-70 (McMillan, J., dissenting).

65. *See, e.g., Harris v. Chapman*, 97 F.3d 499 (11th Cir. 1996); *Abordo v. Hawaii*, 938 F. Supp. 656 (D. Haw. 1996). In *Harris*, the court dismissed the least restrictive means aspect of the RFRA standard with the conclusory statement, "we are unable to suggest any lesser means than a hair length rule for satisfying these interests." 97 F.3d at 504. Although the court did not appear to be fond of the plaintiff, who was described as "a very litigious prisoner," this is hardly an appropriate basis for disregarding the seemingly obvious alternative of requiring long hair to be tied back. *Id*. at 501 n.2. The Native Hawaiian prisoners in *Abordo* also alleged that the hair length regulations discriminated on the basis of gender. 938 F. Supp. at 659. There, although the court found persuasive the State's evidence that the disparity was due to security level differences between the men's and women's facilities, it did not explain at all why threats posed by long hair would be less serious in a women's facility of the same security level. *Id.* This reasoning is undermined when it is highlighted that Abordo was incarcerated at the Halawa Correctional Facility, a medium-security prison. *Id.* at 657. Hawaii has only one women's prison, which houses women at low, medium, and maximum security levels. *See* Hawaii Department of Public Safety: Corrections Division, <http://www.hawaii.gov/psd/corr_home.php>. Mike Gaede, Communications News Director of the Hawaii Department of Public Safety, verified through a personal communication that the women's correctional facility housed maximum security prisoners at the time *Abordo* was decided.

66. In fact, RLUIPA, by specifically defining the term "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" arguably provides more protection to prisoners' free exercise claims than did RFRA, which was interpreted by many courts as including a centrality requirement. 42 U.S.C. § 2000cc-5(7)(A); *see* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 534 (2005).

67. *See Brunskill v. Boyd*, 141 Fed. Appx. 771 (11th Cir. 2005) (unpublished) (holding hair length policy was the least restrictive means of furthering compelling interests of maintaining safety, security, and sanitation); *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005) (holding a regulation that prohibited inmates from growing a kouplock (a two-inch square lock of hair at the base of the skull) was the least restrictive means of furthering security interests, even though a kouplock would not enable a prisoner to easily change his appearance or hide contraband); *c.f. Collins-Bey v. Thomas*, No. 03 C 2779, 2004 U.S. Dist. LEXIS 21348 (N.D. Ill. Oct. 25, 2004) (holding hair length policy facially valid but denying summary judgment because genuine issue was raised concerning the validity of the policy as applied); *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004) (striking down grooming policy that prohibited beards).

68. According to the 2000 Census, prisoners account for nearly half of all institutionalized persons. Information available at <http://www.census.gov>. The remainder of the institutionalized population is composed of persons residing in government facilities for the "mentally ill, disabled, or retarded, or chronically ill or handicapped." 42 U.S.C. § 1997.

69. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2 (B)(11)(vii).

70. *Id.*

71. *Solomon v. Coughlin*, 89 A.D.2d 1045, 456 N.Y.S.2d 125 (3d Dept. 1982). In upholding the directive requiring inmates' hair to be cut upon entry, the Court noted that because inmates are free to grow their hair to any length desired thereafter, the requirement "narrowly satisfies the institutional need for identification without suffering the infirmity of overbreadth which would interfere with the free and open practice of an inmate's religion." 89 A.D.2d 1045, 1046.

72. NYS Dept. of Correctional Services Directive No. 4914 (Inmate Grooming Standards). "Any reception inmate who professes to be a Rastafarian, Taoist, Sikh, Native American, Orthodox Jew, or member of any other religious sect of a similar nature and refuses to have an initial haircut cannot be forced to comply with the initial haircut requirements."

73. *See* Erin Texeria, *Justice is Not Color Blind, Studies Find; Race: Researchers Say Blacks, Browns Receive Tougher Treatment From Legal System*, Los Angeles Times, May 22, 2000.

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The Indian Child Welfare Act Implementation in New York

By Frederick J. Magovern

There are some 76,500 Native Americans residing in New York State according to the 2000 US Census. They belong to seven federally recognized tribes and two New York State recognized tribes: the Cayuga Nation of Indians, the Tuscarora Nation, the St. Regis Mohawk Tribe, the Oneida Indian Nation, the Seneca Nation of Indians, the Onondaga Nation, Tonawanda Band of Senecas, the Unkechauga Nation, and the Shinnecock Tribe. The Indian battles lately fought in New York have been for the most part confined to litigation over land claims[1] and gambling.[2] However, as important and financially significant as such issues may be to the tribes, nothing elicits as visceral a response from the tribes of Native Americans as does a challenge to the custody of their children. The answers to such vexing issues are controlled in New York, as well as elsewhere, by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq*.[3]

The ICWA "was the product of rising concern in the mid-1970s over the consequences to [American Indian and Alaska Native] children, [American and Alaska Native] families, and [American Indian and Alaska Native] tribes of abusive child welfare practices that resulted in the separation of large numbers of American Indian and Alaska Native children from their families and tribes through adoption and foster care placement, usually in non-Indian homes."[4] Congressional hearings revealed that "25 to 35% of all [American Indian and Alaska Native] children had been separated from their families and placed in adoptive families, foster care, or institutions."[5] New York reported that 97% of the Native American children were placed in non-Indian foster homes.[6] Not surprisingly, Congress found that the high rate of placement in non-Indian homes was not in the best interests of Native Americans and enacted the ICWA, noting that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[7]

The stated policy of the ICWA is to establish federal criteria for the removal and placement of Indian children and to give assistance to the various Indian Nations in maintaining their culture and native identity and in their operation of family and child welfare programs:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[8]

The major provisions of the ICWA:

- give the tribe exclusive jurisdiction for child welfare proceedings over reservation-domiciled Native Americans;[9]
- require that state courts notify the interested tribe of any involuntary placement proceedings involving an Indian child;[10]
- require that, absent parental objection or good cause to the contrary, state court proceedings are to be transferred to tribal courts;[11]
- allow the tribe intervention as of right in state court foster care and termination of parental rights proceedings;[12]
- impose placement preferences that govern state foster care, pre-adoptive, and adoptive placements of Indian children;[13]
- fix minimum evidentiary standards and procedures for state court foster care placement and termination of parental rights proceedings;[14]
- establish Federal standards for voluntary foster care placements, surrenders or termination of parental rights, and adoptive placements;[15]
- require full faith and credit be accorded tribal public acts, records, and judicial proceedings in state court proceedings.[16]

Application of the ICWA provisions virtually dictate the course of state termination of parental rights proceedings, foster care and adoption placements. Of no lesser significance are the provisions that require that the state provide remedial and rehabilitative services

before an Indian child may be removed from his or her family absent exigent circumstances.[17] Thus, in any court proceeding that concerns the custody[18] of an Indian child,[19] the presentment agency must first demonstrate to the court that reasonable efforts were made to prevent the placement.

New York State's Department of Social Services, along with the State's Department of Health and the Department of Education, are responsible for seeing that New York's specific obligations to its Native American population are fulfilled. Native American Services came under New York State's Office of Children and Family Services ("OCFS") when it was formed in January 1998. OCFS's Native American Services (formerly known as the Bureau of Indian Affairs) responds to the needs of Indian Nations and their members both on and off the reservations. OCFS provides assistance to both the local social service districts as well as to authorized child care agencies.

A court's determination that state intervention is appropriate and that placement of the Indian child is necessary is just the beginning of the inquiry. The court must follow the specific Foster Care Placement Preferences.[20] The preferences differ somewhat depending upon the nature of the custody proceeding. However, the clear goal is for the Indian child not to lose his or her Indian cultural heritage. The first preference, therefore, is that the Indian child be placed with a member of the child's extended family. If no suitable extended family member is available, the second preference is for the child to be placed with a foster home approved or specified by the Indian child's tribe. If there is no available tribal home, the third preference is for the child to be placed with an Indian foster home certified by the agency. Deviation from the preferences is permissible only if there is a showing of good cause. The ICWA does not specify what constitutes good cause.

In the case of an Indian child being placed for adoption, the authorized child care agency arranging for the adoption must follow the Adoption Placement Preferences.[21] Again, the first adoption preference is for placement with a member of the child's extended family. If there is no extended family member is available, then the preference is for the child to be placed with other members of the child's Indian tribe. In the event no family members or tribal members are available, then the preference is for placement with another Native American family. Only after exhausting the preferences (or upon a showing of good cause to deviate from the preferences) may the Indian child be placed in a non-Indian home for adoption.

The ICWA's purpose is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families."[22] The guiding case is *Mississippi Band of Choctaw Indians v Holyfield*.[23] The Supreme Court has not entertained another ICWA case since *Holyfield*. The issue in *Holyfield* was whether two Indian parents who were residents and domiciliaries of a reservation could defeat the ICWA provisions granting exclusive jurisdiction over adoption proceedings involving domiciliaries of the reservation to tribal courts by leaving the reservation to give birth to their child.[24] The majority held that the jurisdictional requirements of the ICWA could not be defeated simply by temporarily leaving the reservation. The Supreme Court stated that the ICWA was concerned with, *inter alia*, "the interests of Indian children and families" and the placement of such children "outside their culture."[25] The Court noted that the tribe's interest at issue extended only to the "relationship between Indian tribes and Indian children domiciled on the reservation."[26] Thus, the Supreme Court in *Holyfield* limited its holding to cases involving domiciliaries of a reservation, and indicated that the ICWA was directed at existing Indian families and the placement of children from those families outside existing Indian culture. *Holyfield* is relied on by both proponents of the ICWA and those who would limit its application.

Congress also intended for the various state courts to determine when the ICWA should apply to a particular case.[27] New York's experience with the ICWA as reflected in reported decisions has been limited. The New York County Family Court in *In re the Adoption of Christopher*[28] avoided wrestling with the ICWA issues by determining that the ICWA did not apply because the tribe was not a federally recognized tribe. A year later the Fourth Department, in *In re Philip Jaye J., Jr.*,[29] similarly found that the ICWA did not apply because there had been no proof that the child was an Indian child. However, in *Baby Girl S.*[30] there was no way for the Westchester Surrogate's Court to avoid the ICWA issue in the contested private placement adoption proceeding.

The birth mother *In Baby Girl S.* was 13/32 Chickasaw Indian and living in Oklahoma.[31] Neither the birth mother nor her husband resided on a reservation. The birth mother claimed that Baby Girl S. was fathered by a non-Indian male. Four days after the child was born both the mother and her husband gave judicial consent to this child's private placement adoption. Shortly thereafter the adoptive parents returned to their home in New York with the child to finalize the adoption. The adoptive parents notified the Chickasaw Nation of the mother's choice to give the child up for adoption and filed for the adoption in the Westchester County Surrogate's Court. The non-Indian birth father contested the adoption and the Chickasaw Nation moved to intervene in the proceedings. Both the birth mother and her husband supported the adoption throughout the proceedings. The threshold issue that the Surrogate had to

determine was whether the ICWA applied to the private placement adoption.[32]

The Surrogate Court gave a thorough review of the policy and legislative history of the ICWA.[33] It determined that the ICWA was not intended to apply in circumstances where the Indian parent did not live on the reservation; conceived the child with a non-Indian father; had voluntarily consented to the adoption; had relinquished the child at birth so that it lived with the adoptive parents throughout the proceedings; objected to the tribe's intervention; and had no demonstrated connection to the tribe or the "Indian way of life."[34] The court noted too that the Indian birth mother did not want her child adopted by any tribal member and wanted the child to be raised in the "larger community" provided by the adoptive parents who would educate the child as to her heritage. The Surrogate concluded under such circumstances that application of the ICWA would neither further the ICWA's policies nor serve the child's best interests.[35]

In so ruling the Surrogate aligned New York with a minority of other states—California with the largest Native American population prominent among them—that recognized the Existing Indian Family ("EIF") doctrine as a necessary exception to the ICWA to maintain its constitutionality. The EIF doctrine holds that the ICWA cannot legally be applied to voluntary adoption proceedings where neither parent nor the child has significant social, cultural, or political ties with the Indian tribe.[36] The central justification of the EIF is that Congress did not intend to dictate that children of Indian blood who had never been a member of an Indian home or culture, and probably would never be, must be removed from their primary culture and placed in an Indian environment over their parents' objection. The "underlying thread" running throughout the ICWA is concern with the removal of Indian children from an existing Indian family unit and the resulting breakup of that existing Indian family.[37] The Surrogate in *Baby Girl S.* found nothing in *Holyfield* inconsistent with the rationale behind the EIF.[38] No appeal was taken.

At present, 14 states have rejected the EIF exception to the ICWA while 7 jurisdictions have adopted it.[39] Several courts in other states have adopted the EIF exception to the ICWA where there is no existing Indian family from which the adoptive child is being removed.[40] The courts of the states that have rejected the EIF exception do so relying on the Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield*,[41] which they contend implicitly precludes the EIF doctrine.[42]

This issue was recently re-visited, this time by the Family Court of New York County, in *In re Baby Boy C.*[43] Once again, an Indian birth mother, who did not reside on a reservation and who was not a domiciliary of the reservation, and the non-Indian birth father arranged privately for the placement of their child with a New York couple for adoption. The tribe sought to intervene under both the ICWA and pursuant to CPLR 1013 (permissive intervention), which the adoptive parents opposed. The Family Court found that the birth mother had rejected her Indian heritage and that the child was not a member of an existing Indian family that the ICWA was enacted to protect.[44] Nevertheless, the Family Court allowed the tribe to intervene pursuant to CPLR 1013.[45] The adoption was subsequently found to be in the child's best interests. The tribe appealed.

The Appellate Division First Department became the first appellate court in New York to consider the ICWA and the EIF exception. The Appellate Division reversed,[46] finding that while Baby Boy C was an 'Indian child' within the meaning of the ICWA, the tribe had no right to intervene under the ICWA because the ICWA "does not provide for tribal intervention in [private placement] adoption proceedings as a matter of right."[47] As a practical matter, this appears to be a distinction without a difference since the court proceeded to find that the ICWA was clearly implicated in the adoption proceeding and the tribe was allowed to intervene as an interested party under CPLR 1013.[48] The Appellate Division remanded the adoption proceedings to the Family Court for further hearings on the issue of whether good cause existed to deviate from the ICWA adoption placement preferences. The case is *sub judice*.

The Appellate Division in *Baby Boy C.* soundly rejected the EIF doctrine's application in New York and reinforced the statutory mandate that the ICWA is implicated in every adoption case in which an Indian child is involved.[49] Proponents of the EIF will find the Appellate Division's dismissal of the notion that the ICWA is unconstitutional absent the EIF doctrine troublesome. The Appellate Division rejected the Family Court holding that the EIF doctrine was necessary for the ICWA to avoid constitutional infirmity and found that the Family Court applied the wrong standard of assessing the constitutionality of the statute.[50] The unanimous court held that since the adoptive parents had no constitutional right to adopt Baby Boy C. despite his having lived with them since his birth, they had no fundamental liberty interest at stake, and therefore then the ICWA's consitutionality must be evalutated under the rational basis test rather than the strict scrutiny test. The court went on to say:

> Having concluded that no fundamental right or suspect classification is implicated by the application of ICWA in this case, petitioners' constitutional claims are properly evaluated under the rational

> basis test. Applying that test, we agree with those courts that have held that ICWA is rationally related to the protection and preservation of Indian tribes and families and to the fulfillment of Congress's unique guardianship obligation toward Indians.[51]

Child rights advocates will no doubt be troubled by this decision in that it squarely rejected California's child friendly *Bridget R.* decision, where that court found that Bridget R. did indeed have a constitutionally protected right, a liberty interest, in being raised by her *de facto* parents who loved and cherished her and who were committed to adopting her. Here too, the *Baby Boy C.* decision is largely dimissive of the parental perogatives of the birth parents[52] other than to note that a parent's adoption preference is a consideration for deviating from the ICWA adoption preferences. This decision clearly signals that the child's best interests are subordinate to the continued existence of the tribe.

In reaching the conclusion that there is no fundamental right to adopt or be adopted, the Appellate Division relied upon the 11th Circuit Court of Appeals decision *Lofton v. Secretary of Dept. of Children & Family Servs*.[53] *Lofton* concerned Florida's foster care and adoption program, which prohibited same sex foster parents from adopting their foster child. The foster parents challenged this scheme claiming, *inter alia*, that they had a constitutional right to adopt their foster child who had been placed in their care by the state of Florida. The 11th Circuit upheld Florida's right to choose who can adopt its foster child and further held that the foster parents had no constitutional right to adopt.[54] *Baby Boy C.*, however, did not involve New York's foster care program.

The Appellate Division did not consider the United States Court of Appeals for the Second Circuit decision in *Rivera v. Marcus*.[55] *Rivera* involved the removal of two siblings by the Connecticut Welfare Department after being in foster care provided by their half-sister pursuant to a foster care contract. The Second Circuit found that there was a liberty interest deserving of constitutional recognition. The court noted that "the courts have long recognized that children possess certain liberty rights and are entitled to due process protection of these rights."[56] The court went on to state that in making decisions that would upset a long-standing familial relationship, a court must protect a child's due process right in maintaining such a relationship:

> If the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child's long-standing familial relationship.[57]

The Appellate Division in *Baby Boy C.* said that the major flaw with states that accepted the EIF exception was the failure to give adequate consideration to the ICWA "good cause" exceptions,[58] which allow state courts to depart from the placement preferences upon a showing of good cause. The court noted that application of the preferences was not mandatory or automatic. These preferences, according to the court, give state courts the flexibility to deviate from the preferences where the best interests of the parent or child outweigh the tribe's interest in the strict application of those preferences.[59] Although good cause is not spelled out in the ICWA, the Appellate Division found that the Bureau of Indian Affairs' (BIA) guidelines could be relied upon for guidance. The BIA guidelines provide that "good cause" to deviate from the preferences could be based upon the birth parents' request,[60] extraordinary needs of the child as proven by expert testimony, and the unavailability of suitable Indian families for placement.[61] Thus, the Appellate Division posited that the Family Court below might well have reached the same result of allowing the adoption placement without the need invoke the EIF doctrine and precluding the tribe from participating:

> Here, had the Family Court found ICWA applicable and held a placement preference/good cause hearing, it may well have reached the same result of permitting the adoption to proceed without having to rely on a judicially created exception to ICWA that is inconsistent with its language and purpose.[62]

The ICWA serves an important purpose in attempting to preserve the cultural heritage of Indian children. Unfortunately, there are situations where pursuit of this laudable goal can come into conflict with other arguably equally important interests. The aforementioned case law on the ICWA clearly demonstrates the tension between the rights of Indian Tribes and the rights of birth parents of Indian children who are willing to allow and perhaps explicitly want would-be non-Indian parents to adopt their children. Some courts have attempted to resolve this underlying issue by adopting an "Existing Indian Family" exception while other courts, such as the First Department of New York in *Baby Boy C.*, find no basis for this judicially created exception, instead relying on the "good cause" provisions to the ICWA.

The Appellate Division decision in *Baby Boy C.*, while not as of yet final, certainly should be reassuring to the tribes of New York that the ICWA will be enforced in New York. However, decisions such as *Baby Boy C.* also arguably show that the ICWA as applied does not give sufficient weight to the rights of both the birth parents of an Indian child and those seeking to adopt.

Endnotes

1. *Sherrill v. Oneida Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478 (2005) (Oneidas could not "unilaterally reassert sovereign control and remove these parcels from the local tax rolls." *Id.* at 1493).
2. *Dalton v. Pataki*, 5 N.Y.3d 243, 802 N.Y.S.2d 72 (2005) (holding that federal Indian Gaming Regulatory Act preempts state law).
3. New York statutes and regulations incorporate the ICWA mandates. *See*, *e.g.*, N.Y. Domestic Relations Law § 75-c; N.Y. Social Services Law §§ 2 (35 & 36), 39; N.Y. Family Court Act 115(d); Uniform Civil Rules for Supreme and County Court 202.68; Uniform Rules for the Family Court 205.51; Uniform Rules for the Surrogate's Court 207.59.
4. *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 32 (1989).
5. *Id.*
6. *Hearing on S.1214 before the Select Committee on Indian Affairs*, U.S. Senate, 95th Cong. 539 (1977).
7. 25 U.S.C. § 1901(3).
8. 25 U.S.C. § 1902.
9. 25 U.S.C. § 1911(a).
10. 25 U.S.C. § 1912(a).
11. 25 U.S.C. § 1911(b).
12. 25 U.S.C. § 1911(c).
13. 25 U.S.C. § 1915(c).
14. 25 U.S.C. § 1912(e)-(f).
15. 25 U.S.C. § 1915.
16. 25 U.S.C. § 1911(d).
17. 25 U.S.C. §§ 1912(d), 1922.
18. The ICWA is not implicated in matrimonial proceedings.
19. *See*, *e.g.*, N.Y. Social Services Law §§ 358-a, 384-b (voluntary placement proceedings and guardianship proceedings, respectively); N.Y. Family Court Act art. 10 (FCA) (neglect and abuse proceedings); N.Y. FCA arts. 3, 7 (Juvenile delinquency and PINS [Persons In Need of Supervision] proceedings, respectively).
20. N.Y. Comp. Codes R. & Regs. tit. 18, § 431.18(f)(1) (N.Y.C.R.R.).
21. 18 N.Y.C.R.R. § 431.18(g)(1).
22. 25 U.S.C. § 1902.
23. 490 U.S. 30 (1989).
24. *Holyfield*, 490 U.S. 32-54.
25. *Id.* at 49-50.
26. *See id.* at 52, *quoting*, *In re Adoption of Halloway*, 732 P. 2d 962, 969-70 (Utah 1986).
27. *Kiowa Tribe of Oklahoma v Lewis*, 777 F.2d 587, 591 (10th Cir. 1985) (refusing to review a state court's determination that ICWA did not apply under *res judicata* and full faith and credit principles).
28. 73 Misc. 2d 851, 662 N.Y.S.2d 366 (Fam. Ct., New York Co. 1997).
29. 256 A.D.2d 1201, 684 N.Y.S.2d 94 (4th Dep't 1998).
30. 181 Misc. 2d 117, 125, 690 N.Y.S. 2d 907 (Surr. Ct., Westchester. Co. 1999).
31. *Id.* at 119.
32. *Id.* at 120-21.
33. *Id.* at 121-25.
34. *Id.* at 125.
35. *Id.* at 126.
36. *See id.* at 122.
37. *In re Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982).
38. *In re Baby Girl S.*, 181 Misc. 2d 117, 125, 690 N.Y.S.2d 907 (Surr. Ct., Westchester Co. 1999).
39. *See In re Baby Boy C.*, 27 A.D.3d 34, 46 n.4, 805 N.Y.S.2d 313, 322 n.4 (1st Dep't 2005) (surveying various states' treatment of the EIF exception to the ICWA).
40. *See In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. Ct. App., 2d Dist. 2001) (California); *In re Crystal R.*, 59 Cal. Rptr. 4th 703, 69 Cal. Rptr. 2d 414 (Cal. Ct. App., 6th Dist. 1998) (California); *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (Cal. Ct. App., 2d Dist. 1996) (California); *In re Alexandria Y.*, 45 Cal. App. 4th 1483, 53 Cal. Rptr. 2d 679 (Cal. Ct. App., 4th Dist. 1996) (California); *In the Interest of D.C.C.*, 971 S.W.2d 843 (Mo. Ct. App. 1998) (Missouri); *S.A. v E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990) (Alabama); *Rye v. Weasel*, 934 S.W.2d 257 (Kent. 1996) (Kentucky); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995) (Louisiana); *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988) (Indiana); *In re Crews*, 825 P.2d 305 (Wash. 1992) (Washington); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997) (Tennessee).
41. 490 U.S. 30 (1989).
42. *See, e.g.*, *In re Elliott*, 554 N.W.2d 32, 36 (Mich. Ct. App. 1996).
43. 5 Misc. 3d 377, 784 N.Y.S.2d 334 (Fam. Ct., New York Co. 2004).
44. *Id.* at 379-80.
45. *Id.* at 386.
46. *In re Baby Boy C.*, 27 A.D.3d 34, 36, 58, 805 N.Y.S.2d 313, 314, 331 (1st Dep't 2005).
47. *Baby Boy C.*, 27 A.D.3d at 55-56, 805 N.Y.S.2d at 329.
48. *Id.*
49. *Id.* at 36, 55-56, 805 N.Y.S.2d. 318-19, 322-23.
50. *Id.* at 49-52, 805 N.Y.S.2d. 326-27.
51. *Id.* at 52, 805 N.Y.S.2d. 326 (citations omitted).
52. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (stating that "the interests of parents in the care, custody and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court").
53. 58 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).
54. *Id.* at 827.
55. 696 F.2d 1016 (2d Cir. 1982).
56. *Rivera*, 696 F.2d at 1026, *citing Parham v J. R.*, 442 U.S. 584, 596-97 (1979) ("the . . . children [in this case] surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth." *Id.*).
57. *Id.*
58. 25 U.S.C. § 1915.
59. *In re Baby Boy C.*, 27 A.D.3d 34, 52-53, 805 N.Y.S.2d 313, 327 (1st Dep't 2005), *citing*, *In re Alicia S.*, 65 Cal. App. 4th 79, 89 (Cal. Ct. App., 5th Dist. 1998).
60. While not noted in the decision, the birth parents conditioned the adoption upon their child being raised in the Jewish religion. Religious preferences might also be considered good cause to deviate from the preference.
61. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg. 67,584, 67,594 F.3 (Nov. 26, 1979).
62. *In re Baby Boy C.*, 27 A.D.3d at 53, 805 N.Y.S.2d at 327 (citation omitted).

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Off-Reservation Indian Gaming: Will Congress Change the Rules?

By Bennett Liebman

Indian gaming has become an enormous business in the United States. In 1988 before the passage of the Indian Gaming Regulatory Act[1] ("IGRA"), Indian gaming was a $100 million a year industry.[2] IGRA has transformed the economies of many tribes with gross gambling revenue for the tribes currently nearing $20 billion[3] with over 367 Indian casinos in operation.[4] Even with this success, most Indian casinos are considered relatively small[5] and not located in urban areas. The largest American cities are, by and large, not particularly close to tribal casinos.

A look at the five largest American cities shows that none of these cities is particularly close to Indian casinos. For example, the nearest Indian casinos to New York City are the Foxwoods and Mohegan Sun casinos which are approximately 135 miles from the New York City airports.[6] The nearest Indian casino to Chicago is in Milwaukee. While there are more than fifty tribal casinos in California generating in excess of $6 billion in revenue,[7] few are located near Los Angeles, and there are almost no Indian casinos near Philadelphia or Houston.

Given the success of tribal casinos, plus the opportunity for economic development and wealth presented by locating a casino near a major urban area, it is not entirely surprising that many tribes and developers have attempted to locate tribal casinos in sites close to major urban centers. As the federal Seventh Circuit Court of Appeals has stated:

> The lucky winners at blackjack, baccarat, twenty-one, and the slot machines are not the only ones who see the prospect of great wealth flowing from casinos. Even more so (and even more reliably), wealth comes to those who own and operate gambling establishments. Casino gambling has become a major enterprise for many Native American groups, as Congress has paved the way for their entry into that business.[8]

The attempts to build Indian casinos in more economically desirable area areas, however, have been affected significantly by the IGRA. Section 2719 provides generally that "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe [after October 17, 1988]."[9] The act does provide a number of exceptions to this general prohibition against off-reservation gambling.[10] This has led to many tribes, and their backers, attempting to use political pressure to influence decisions made by Congress and the Department of the Interior on off-reservation gambling. Thus "while the Interior Department may sound like the dullest of federal agencies, its power to approve tribal casinos has made it the locus of a new generation of political sleaze and intrigue."[11]

Indian Land in Trust

Section 5 of the Indian Reorganization Act of 1934[12] has traditionally given broad authority to the Secretary of the Interior to acquire property in trust for Indian tribes. The opening sentence of this section states:

> The Secretary of the Interior is . . . authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.[13]

The provision has been implemented by regulations concerning off-reservation properties which similarly grant broad powers to the Secretary of the Interior. The regulations provide:

> a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
>
> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[14]

Efforts to find the trust authority of the Interior Department unconstitutional or to limit the scope of the trust authority have been unsuccessful. Courts have found that the trust authority does not amount to an unconstitutional delegation of congressional power.[15] The act itself contained sufficient standards to guide the discretion of the Secretary of the Interior.[16]

IGRA and Lands in Trust

While the general trust authority is broad, it is tempered for gambling purposes by IGRA. In enacting 25 USC § 2719, "Congress struck a balance between tribal sovereignty and states' rights."[17] This section does not provide general "authority to take land into trust for Indian tribes. Rather, [this provision] is a separate and independent requirement to be considered before gaming activities can be conducted on land taken into trust after October 17, 1988, the date IGRA was enacted into law."[18]

As such, IGRA appears to create an exception to the broad authority given to the Secretary of the Interior to place land into trust. Subsection (a) of § 2719 states in part, "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe [after October 17, 1988]." Nonetheless there are five exceptions in § 2719 to the exception limiting off-reservation gaming, three in subsection (a) of § 2719 and two in subsection (b) of § 2719. The subsection (a) exceptions are as follows:

> (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on [October 17, 1988]; or
> (2) the Indian tribe has no reservation on [October 17, 1988], and—
> (A) such lands are located in Oklahoma and—
> (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary; or
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
> (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.[19]

The two additional exceptions are in subsection (b) of § 2719. The first exception is:

> when . . . the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.[20]

The second exception contains three additional subparts. It states that the general ban against gaming will not apply to lands that are "taken into trust as part of—(i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition."[21]

All of these exceptions have been unaltered since the enactment of IGRA in 1988. There is also almost no legislative history involving the scope of these exceptions. There was no floor debate on the exceptions, and the Senate Report on the legislation simply states that § 2719 "[s]ets forth policies with respect to lands acquired in trust after enactment of this act and applies the Internal Revenue Code to winnings from Indian gaming operations."[22]

Finally, the decisions interpreting the exceptions have been of limited significance. To the extent that these cases provide any guidance, they tend to uphold the general exercise of the powers of the Bureau of Indian Affairs and the Secretary of the Interior.

Two cases have found that the prerequisite of obtaining the governor's approval in order to provide for gaming under the § 2719(b)(1)(A) exception is constitutional.[23] The governor's approval requirement has been found valid against the arguments that it constituted a violation of (a) the separation of powers doctrine,[24] (b) the nondelegation doctrine,[25] and (c) the appointments clause.[26]

The cases under § 2719 have also given the Secretary of the Interior considerable discretion to restore lands to a tribe that has been restored to recognition under § 2719(b)(1)(B)(iii).[27] The District of Columbia Circuit has found that the "restoration of lands" exception in IGRA embodies "policies counseling for a broader reading" of the exception,[28] and that the exception should be read "that the 'restoration of lands' is to a restored tribe what the 'initial reservation' is to an acknowledged tribe: the lands the Secretary takes into trust to re-establish the tribe's economic viability."[29]

The Sixth Circuit may have even read the exception for restored lands in a broader fashion. It found that the general bar against off-reservation gaming in § 2719 "should be construed narrowly (and the exceptions to the bar broadly) in order to be consistent with the purpose of the IGRA, which is to encourage gaming."[30]

Reviewing the Exceptions

Several of the five exceptions have not been particularly controversial. The exceptions in § 2719(a) have as a general rule produced few debates. For example, the (a)(1) exception authorizing on-reservation and contiguous land acquisitions has produced a total of seven gaming acquisitions approved by the Department of the Interior.[31]

The other exceptions in § 2719(a) have been even less noteworthy. There have been no gaming acquisitions approved by the Department of the Interior for lands outside Oklahoma and located within a tribe's last recognized reservation in a state where the tribe is currently located.[32] Nor have there been any approved trust acquisitions for gaming under the § 2719(a)(2)(A) exceptions for Oklahoma tribes.[33] As of July 2005, there were also no proposed trust acquisitions pending before the Interior Department under § 2719(a)'s exceptions.[34]

The major off-reservation Indian gaming issues all involve the exceptions in § 2719(b). The two-part determination of (b)(1)(A) has been a frequent subject of contention. In only three instances have both the Secretary of the Interior and the governor of the affected state actually given positive approval of the establishment of an off-reservation casino.[35] The most recent occasion where both the Secretary of the Interior and the governor agreed was in 2002 involving the Keweenaw Bay Indian Community and Governor Engler in Michigan.[36]

There have been a number of high-profile occasions where the governor failed to concur in the determination of the Secretary of the Interior that gaming would be in the best interest of the tribe and would not be detrimental to the surrounding community.[37] Additionally, many applications for approval under the two-part determination have been pending before the Department of the Interior for many years—if not decades—awaiting departmental action. The saga of Monticello Raceway in New York's Catskill Mountains—which has tried to utilize the two-part determination process to obtain a casino since 1996—is instructive on the duration of this process.[38] As of May of 2005, there were "eleven applications for two-part determinations under . . . (b)(1)(A) pending with the Bureau of Indian Affairs for sites in New York, Wisconsin, Michigan, California, and Oregon. Of these, only one concerns the proposed acquisition of land in a state other than where the tribe is currently located. However, more applications are rumored to be in development for cross-state acquisitions, including potential applications in Ohio, Colorado, Illinois, and New York."[39]

The three sub-parts of the (b)(1)(B) exception have also been the subject of numerous controversies. Perhaps the least disputatious of these exceptions has been the (ii) exception for the initial reservation of an Indian tribe acknowledged by the Secretary. This has only happened on three occasions[40] with the most notable being the acknowledgment of the Mohegan tribe in Connecticut in 1995 which led to the creation of the Mohegan Sun casino.[41]

The exception in (i) regarding settlement of a land claim has also only been utilized on four occasions—all in support of the Seneca Tribe of New York in its development of a casino in Niagara Falls.[42] Nonetheless, casino opponents have brought a lawsuit against the development of a Seneca Tribe casino in the city of Buffalo. These opponents argue that the claimed basis for the gambling acquisitions in Niagara Falls—and hence any future gambling acquisitions in the city of Buffalo—(the Seneca Nation Settlement Act of 1990)[43] did not involve the settlement of a land claim.[44]

Additionally, many tribes have considered using the settlement of a land claim exception as a way of avoiding the time-consuming two-part process of (b)(1)(A). For example, one plan to authorize casinos in New York's Catskill Mountain area was to have the tribes with land claims reach a settlement with the state and the federal government on the claims. The tribes would utilize the threat of the land claim to blackjack the state into a casino gaming agreement.[45] In New York's case, the use of the land claim as a method to acquire the rights to a casino was put into jeopardy by the recent decision of the Second Circuit Court of Appeals in *Cayuga Indian Nation v. Pataki*.[46] The court dismissed a New York possessory land claim of "historic vintage"[47] on equitable grounds, which seemed to extinguish any possibility of a valid land claim in New York State by those out-of-state tribes that were seeking the right to conduct gambling in New York.

The most utilized exception has been the (iii) exception for the restoration of land for a tribe that has been restored to federal recognition. This has been the basis for twelve gaming acquisitions.[48] It also has provided for numerous political and legal complications, as tribes seek better locations for their casinos and are opposed by other tribes, private casino operators seeking protection from competition, and anti-gaming activists.[49] For example, a major (iii) battle is shaping up in Washington State, in the suburbs of Portland, Oregon, involving the Cowlitz Tribe. The Cowlitz Tribe was recognized in 2002 but lacks a reservation.[50] The tribe is seeking to utilize the (iii) exception to build a 134,150 square foot casino in the suburban Portland area.[51] Its application is supported by developers and the Mohegan Tribe of Connecticut which is seeking to manage the casino and is opposed by anti-gambling forces and local card rooms.[52]

Examples of Political Influence

One of the earliest examples of political influence involved the Four Feathers effort to build an off-reservation casino at a greyhound racetrack outside of Hudson, Wisconsin St. Croix Meadows. Three tribes and a busi-

nessman sought to have the Department of Interior take the facility into trust in order to authorize Indian gaming under the two-part determination process of § 2719(b)(1)(A). The application was opposed by the St. Croix Chippewa Indians of Wisconsin which operated two gaming facilities in the area.[53]

It was alleged that in its efforts to block the casino development, the St. Croix tribe utilized considerable political influence to try to block the Four Feathers application. After the massive lobbying effort, the Department of Interior rejected the request to take the greyhound track into trust.

As detailed in *Sokaogon Chippewa Community v. Babbitt*:

> agency officials met with opposition groups and did not notify the applicant until six weeks later; the head of the Democratic National Committee met opposition groups and shortly thereafter contacted the White House chief of staff and the agency about the application; a lobbyist laid out the explicit political ramifications of an agency decision to the White House chief of staff; the agency faxed two letters to the White House chief of staff for his signature, allowing him to determine whether to announce the department's decision or to keep it secret until a later date; the regular decisionmaker recused herself after the decision on the application was made; upper-level agency officials rejected the conclusions of the area office and agency staff without conducting further factual inquiries of their own; agency officials relied on a reason for denying the application (local opposition) that is considered insignificant with respect to a later, similar application; and the head of the agency said that he was directed explicitly by the White House chief of staff to issue the agency decision on a given date.[54]

In *Sokaogon Chippewa Community v. Babbitt*, the district judge authorized the court to consider extrinsic evidence in determining whether the Interior Department acted improperly in rejecting the application for off-reservation gambling. Eventually, the parties agreed to reconsider the Four Feathers application. The Department of Interior eventually agreed to place the land in trust, but the governor of Wisconsin refused to concur with the determination.[55]

In 2000, Congressman George Miller of California was successful in restoring land for the Lytton Band of Pomo Indians. The restored land was in San Pablo, California located in the lucrative San Francisco Bay area. Specifically, a provision of the Omnibus Indian Advancement Act of 2000 "directed the interior secretary to take the Casino San Pablo and its adjacent parking lot into trust for the Lytton Band and back-date the acquisition to Oct. 17, 1988. That would put it outside tough restrictions on gambling on newly acquired lands contained in the Indian Gaming Regulatory Act passed that year."[56]

The amendment contained in the § 819 of the Omnibus Indian Advancement Act of 2000 read:

> Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costa, California, Deed Instrument Number 2000–229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 467). Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.[57]

While the Lytton Band has made significant efforts to open a casino, thus far, its efforts to open a Class III facility have been rebuffed. They are operating a very successful Class II gaming facility.[58] On the other hand legislative attempts by Senator Feinstein of California to terminate the backdating of the Lytton Band restoration—and thus make the restoration subject to restrictions under IGRA—have also proved unsuccessful.[59]

The Abramoff Influence

Disgraced lobbyist Jack Abramoff is associated with the most brazen attempts to use political influence to affect decisions involving Indian gaming off the reservation. Abramoff and his partners represented the Coushatta Tribe of Louisiana which has run a casino since 1995 in southwestern Louisiana, not far from the Texas border. The Louisiana Coushattas paid Abramoff and his partners approximately $32 million for lobbying and other services.[60] Abramoff's basic efforts were designed to prevent the Jena Band of Choctaw Indians from opening a casino near the Coushatta casino. The Jenas sought to have land taken in trust under the two-part approval requirement of § 2719(b)(1)(A).

As stated in the *Chicago Tribune*, "Abramoff recruited prominent Christian conservatives James Dobson and Ralph Reed to campaign against the Jena Band's casino on the grounds it would expand gambling, even though Abramoff's clients were casinos."[61] House Speaker Dennis Hastert sent a letter to the Department of the Interior in opposition to the Jena Band application a week after Abramoff held a fundraiser for Hastert's political action committee.[62] The Interior Department initially rejected the Jena Band's request in March of 2002, citing the compact's imposing an improper tax on the tribal casino.[63] The Jenas persisted and eventually won Interior approval at a different site in northwestern Louisiana off the reservation in late 2003.[64] The plan has been tied up without a gubernatorial approval.[65]

Abramoff also sought to influence the Department of Interior staff directly. In what has been described as a near-Byzantine lobbying effort,[66]

> Abramoff directed his tribal clients to give at least $225,000 to the Council of Republicans for Environmental Advocacy, a conservative group that was founded by Gale A. Norton before President Bush chose her to be his interior secretary. Federal officials are investigating the nature of the relationship between the group's president, Italia Federici, and Norton's then-deputy, J. Steven Griles.[67]

Federici "lobbied Steve Griles, . . . on Abramoff's behalf, on behalf of his tribes. She'd call him, she'd talk to him about issues that Abramoff was concerned about."[68]

Abramoff's most cynical actions may have involved the Tigua Indians in the El Paso, Texas area. An Abramoff lobbying campaign in 2001 was instrumental in the state of Texas closing down the Tiguas' casino. In 2002, Abramoff decided to try to become a lobbyist helping to restore the Tiguas' casino. Abramoff e-mailed Conservative activist Ralph Reed stating, ''I wish those moronic Tiguas were smarter in their political contributions. I'd love us to get our mitts on that moolah!! Oh well, stupid folks get wiped out.''[69] The Tiguas, in turn, hired Abramoff, and Abramoff unsuccessfully tried to restore the tribe's gaming rights by having a provision inserted in a bipartisan election reform bill.[70]

The upshot from Abramoff's chutzpah and his guilty plea to charges involving fraud, tax evasion and conspiracy to bribe public officials[71] has prompted legislative efforts to put significant limits on allowing off-reservation tribal gaming.

Potential Changes to IGRA's Off-Reservation Exceptions

Not surprisingly, the Abramoff revelations have placed significant pressure on Congress to limit reservation shopping; "[t]here is plenty of talk in the House and Senate of . . . strengthening oversight and regulation of the gaming operations or put new restrictions on them. And the number of proposals has been multiplying since the Abramoff story broke."[72]

Congressman Mike Rogers of Michigan has introduced two bills in the 109th Congress to restrict approval of off-reservation gambling. H.R. 4677 would simply place a two-year moratorium on all new tribal-state compacts for gaming. H.R. 2353, his Common Sense Indian Gambling Reform Act, would add a number of barriers to the approval of off-reservation gambling. A tribe would only be authorized to conduct gaming "on only one contiguous parcel of Indian lands. Such Indian lands must be located where that Indian tribe has its primary geographic, social, and historical nexus and within the State or States where the Indian tribe is primarily located."[73] In most instances, land may only be taken into trust for gaming purposes if the state and all the local governments within or contiguous to the trust area give their approval.[74]

Congressman Charles Dent of Pennsylvania has introduced legislation to limit casino expansion.[75] Congressman Dent's bill would eliminate the three exceptions for settlements of land claims, initial reservations, and restored tribes in subparagraph (B) of § 2719(b)(1). Additionally, while the two-part determination is retained in § 2719(b)(1)(A), the second part of that determination is altered so that both the governor and the legislature in the state where the land is located must consent to the land trust application. Neither the Dent bill nor the Rogers bills have passed the House Committee on Resources.

Arguably, a more significant bill has been introduced by Senator John McCain of Arizona who serves as the chairman of the Senate Committee on Indian Affairs. Under the McCain proposal, the two-part determination exception of § 2719(b)(1)(A) was repealed for submissions after November 18, 2005, the date his bill was introduced.[76]

In introducing his measure, McCain stated:

> Related to protecting the integrity of Indian gaming is the issue of off-reservation gaming. When enacted in 1988, IGRA generally banned Indian gaming that was not located on reservations, however, in the interest of fairness, several exceptions to this ban were provided. Exploitation of these exceptions, not anticipated at the time IGRA was enacted, has led to a burgeoning practice by unscrupulous developers seeking to profit off Indian tribes desperate for economic development. Predictably, these ill-advised deals have invited a backlash

> against Indian gaming generally. These amendments to IGRA will put an end to the most troublesome of these proposals by eliminating the authority of the Secretary to take land into trust off-reservation pursuant to the so-called "two-part determination" provisions of Section 20.[77]

The McCain bill also modifies the three exceptions in § 2719(b)(1)(B). The exception for a land claim requires that the land claimed by a tribe must be located either in the state where it has a reservation or had its last recognized reservation. For restored lands or for the initial reservation, the Secretary of the Interior must find that "the Indian tribe has a temporal, cultural, and geographic nexus to the land"[78] in order to authorize the taking of the land into trust.

McCain's introductory remarks on the § 2719(b)(1)(B) amendments included the following:

> In addressing concerns about other exceptions in Section 20 for land claims, initial reservations and restored reservations, these amendments strike a balance by curbing potential abuses of these exceptions, while not unfairly penalizing those who lost their lands through no fault of their own, or even had them taken illegally—often by force. Thus, newly recognized and restored tribes may still obtain lands, and conduct gaming on them, but such lands must be in the area where the particular tribe has its most significant ties. This has been the case for most newly recognized and restored tribes, and surely is not unfair to impose on all similarly situated tribes. For tribes that successfully reclaim lands taken illegally and want to conduct gaming on them, these amendments will require congressional confirmation and the lands must be within the state where the tribe has or had its last reservation. This provision does not impair any tribe's legal rights to reclaim lands, but will discourage attempts by creative non-Indian developers to turn a tribe's legal rights into a form of extortion.[79]

Congressman Richard Pombo of California, the chairman of the House Resources Committee, is also expected to introduce legislation restricting off-reservation Indian gaming.[80] Congressman Pombo has been circulating a discussion draft bill on gaming which would restrict trust acquisitions of land for gaming purposes.[81] Replacing the provisions in § 2719(b)(1), the Pombo draft would require that for a trust acquisition for gaming purposes (a) the lands must be within the state of such tribe and be located where "the Indian tribe has its primary geographic, social, and historic nexus,"[82] (b) the Secretary of the Interior must find that the gaming is in the best interest of the tribe and not detrimental to the surrounding community and nearby Indian tribes, (c) both the governor and the legislature of the affected state must approve the gaming, (d) the nearby tribes must concur, and (e) the county where the land is located must hold a referendum approving the gaming. The Pombo draft legislation is softened by allowing a tribe without a casino, on invitation, to lease the reservation land of another tribe in its state for gaming purposes.

Congressman Pombo's draft has been criticized by a number of anti-gaming activists. The Congressman has been the recipient of more than $500,000 from tribes, their members and lobbyists and other gaming interests in the past three years, making Pombo the third-leading beneficiary of Indian money in Congress.[83] Tom Grey, executive director of the National Coalition Against Legalized Gambling has stated that the Pombo draft "would do little to control Indian gambling. . . . It would help existing casinos."[84]

Additionally, the Department of Interior has stated that it now has plans to draft off-gambling regulations by the end of 2006.[85]

Conclusion

While there seems to be a general call to action to alter the rules governing lands acquired by tribes for gaming purposes, there does not appear to be a consensus on what changes will be made in § 2719. Indian gaming has been unpredictable since its start, and the odds are that any changes in the law will also be nearly impossible to predict. Top flight poker players are renowned for their ability to spot tells—their ability to decipher from non-oral cues what hands are held by other players in the game. In the game of off-reservation casinos, there are no tells and limited ability to foresee the path of any future legislation.

Endnotes

1. 25 U.S.C. §§ 2701-21.
2. *First Session on Oversight Hearing on the Regulation of Indian Gaming: Hearing Before the Comm. on Indian Affairs*, 109th Cong. 1 (2005) (statement of Senator John McCain, Chairman, Senate Comm. on Indian Affairs), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:20956.wais>.
3. Jim Boren, *Indian Gaming is Trying to Move into the Cities*, Scripps Howard News Service, Feb. 17, 2006; SignOn San Diego, *U.S. Tribal Gaming Revenue Revised Upward for 2004*, The San Diego Union-Tribune, Jan. 20, 2006, *at* <http://www.signonsandiego.com/news/business/20060120-1059-leisure-indiangaming-revenue.html>; National Indian Gaming Comm., Growth in Indian Gam-

ing, *at* <http://www.nigc.gov/nigc/tribes/ grthnindgam2004 to1995.jsp>.

4. *See* National Indian Gaming Comm., National Indian Gaming Commission Tribal Gaming Revenues, *at* <http://www.nigc.gov/ nigc/tribes/trigamrev2004to2003.jsp>.
5. Only 15 of the 367 Indian casinos (4% of casinos) had revenues in excess of $250 million in 2004. *See id.*
6. *See* Mohegan Sun, Driving Directions, *at* <http://www. mohegansunmeetings.com/mplanner/location/ driving_directions.jsp> (stating the mileage from New York City to Mohegan Sun is approximately 135 miles) Foxwoods Resort & Casino, Getting Here, *at* <http://www.foxwoods.com/GlobalLinks/ DirectionsTransportation/ Car/Car.aspx> (stating the driving time from New York City to Foxwoods to be about two and a half hours).
7. Erica Werner, *Indian Casinos Nationwide Took in $18.5 Billion Law Year*, The San Diego Union-Tribune, Feb. 16, 2005, *available at* <http://www.signonsandiego.com/uniontrib/20050216/news_ 1n16gaming.html>.
8. *Sokaogon Chippewa Cmty v. Babbitt*, 214 F.3d 941, 943 (7th Cir. 2000).
9. 25 U.S.C. § 2719(a).
10. *See*, *e.g.*, 25 U.S.C. § 2719(b)(1).
11. Michael Crowley, *Kinder Dispatch: Tribal Counsel*, The New Republic, June 20, 2005, at 24.
12. Codified at 25 U.S.C. § 465.
13. *Id*.
14. 25 C.F.R. § 151.3.
15. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 973-74 (10th Cir. 2005) (rejecting a claim that 25 U.S.C. § 465 violates the non-delegation doctrine); *Carcieri v. Norton*, 398 F.3d 22, 33 (1st Cir. 2005) (finding that Congress had properly delegated authority to the Secretary of the Interior as § 465 contains standards for the Secretary's exercise of discretion), *aff'd on rehearing*, 423 F.3d 22 (1st Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999) (denying a non-delegation doctrine challenge to § 465 reasoning that "the statute itself places limits on the Secretary's discretion.").
16. *Roberts*, 185 F.3d at 1137 (rejecting the claim that "§ 465 unconstitutionally delegates standardless authority to the Secretary").
17. *Oversight Hearing on IGRA Exceptions and Off-Reservation Gaming: Hearing Before the Senate Comm. on Indian Affairs,* 109th Cong. 1 (2005) (statement of George Skibine, Acting Deputy Assistant Secretary, Indian Affairs for Policy and Economic Development, Dep't of the Interior), *available at* <http://www.indian.senate.gov/ 2005hrgs/072705hrg/skibine.pdf> [hereinafter *2005 IGRA Exceptions Senate Hearing*].
18. *Oversight Hearing Concerning Off-Reservation Gaming: The Process for Considering Gaming Applications Before the Senate Comm. on Indian Affairs*, 109th Cong. 1 (2006) (statement of George Skibine, Acting Deputy Assistant Secretary, Indian Affairs for Policy and Economic Development, Dep't of the Interior), *available at* http://www. indian.senate.gov/2006hrgs/020106hrg/Skibine.pdf [hereinafter *2006 Off Reservation Gaming Senate Hearing*].
19. 25 U.S.C. § 2719(a).
20. *Id.* § 2719(b)(1)(A).
21. *Id.* § 2719(b)(1)(B).
22. S. Rep. No. 100-446 at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3090.
23. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 659 (7th Cir. 2004) (stating "a governor does not enact federal policy by issuing a concurrence, but instead merely waives one legislatively enacted restriction on gaming"), *cert. denied*, 543 U.S. 1051 (2005); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 697 (9th Cir. 1997) (finding that "the authority exercised by the Governor under IGRA is . . . not significant enough to require appointment. . . [because] the Governor operates on an episodic basis for concurring in or rejecting the suggestion of the Secretary . . . [and] is not given the sole authority for enforcing IGRA"), *cert denied*, 522 U.S. 1027 (1997).
24. *Lac Courte*, 367 F.3d at 655-56.
25. *Id*. at 658-59.
26. *Id*. at 660-62.
27. *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (upholding the Secretary's confirmation that the tribe at issue qualified as a "restored" tribe under § 2719(b)(1)(B), thus making it eligible for gaming privileges and bypassing a more burdensome finding under § 2719(b)(1)(A) that the gaming establishment would not be detrimental to the surrounding community); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Atty.*, 369 F.3d 960 (6th Cir. 2004) (finding that the tribe qualified as a "restored" tribe under § 2719(b)(1)(B) by relying on the Secretary's decision to "acknowledge" the tribe in 1980); *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 974 (2004); *Oregon v. Norton*, 271 F. Supp. 2d 1270 (D. Or. 2003) (ruling in favor of the Secretary's interpretation of the "restored lands" exception).
28. *City of Roseville*, 348 F.3d at 1030.
29. *Id*. at 1031.
30. *Grand Traverse Band,* 369 F.3d at 971.
31. Skibine, *2005 IGRA Exceptions Senate Hearing*, *supra* note 17, at 5.
32. *Id.* at 5-9.
33. *Id.*
34. *Id*. at 9.
35. *2006 Off Reservation Gaming Senate Hearing*, *supra* note 18 at 2; *see also The Second Discussion Draft of Legislation Regarding Off-Reservation Indian Gaming: Before the House Committee on Resources*, 109th Cong. 4 (2005) (statement of Ernest L. Stevens, Chairman, National Indian Gaming Association), *available at* <http://resources committee.house.gov/archives/109/testimony/2005/ erneststevensjr.pdf>.
36. The Department of the Interior approved the application in 2000, and Governor Engler approved it in 2002. *See* Gambling Magazine, *Ojibwa II Casino Gets Federal Approval,* Gambling News, *available at* <http://gamblingmagazine.com/articles/14/14-753.htm>.
37. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 653 (7th Cir. 2004) (discussing the non-concurrence of the tribe's application by the Governor of Wisconsin); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 691-92 (9th Cir. 1997) (discussing the Governor of Oregon's failure to concur with the Secretary's favorable determination of the tribe's gaming application).
38. *See* Marc Heller, *Mohawks Could Have Long Wait for Casino Approval*, Watertown Daily Times (N.Y.), Nov. 15, 2005.
39. *Oversight Hearing Concerning Taking Lands into Trust: Hearing Before the Senate Committee on Indian Affairs,* 190th Cong. 3 (2005) (statement of George Skibine, Acting Deputy Assistant Secretary, Indian Affairs for Policy and Economic Development, Department of the Interior), *available at* <http://indian.senate.gov/2005hrgs/ 051805hrg/skibine.pdf.>.
40. Skibine, *2005 IGRA Exceptions Senate Hearing*, *supra* note 17, at 2.
41. *See* Stephen Heffner, *Casino Helps Mohegans Reestablish their Identity*, Providence Journal-Bulletin, Oct. 6, 1996, at 1A; David Lightman, *Mohegans Get Montville Reservation, Prepare to Build Casino*, Hartford Courant, Sept. 30, 1995, at A1.
42. Skibine, *2005 IGRA Exceptions Senate Hearing*, *supra* note 17, at 2.
43. 25 U.S.C. § 1774.

44. Jerry Zremski, *Could Lawsuit Against Casino Succeed?* Buffalo News, Jan. 8, 2006, at A1.

45. *See* Peter Lyman, *Congress Could Step Into Land Dispute*, Post Standard (Syracuse, NY), Oct. 11, 2005 at A1; *see also* Lisa W. Foderaro, *Catskill Casinos: An Issue Left in Limbo by Discord and Indecision*, N.Y. Times, Aug. 29, 2005, at B1 (describing local support and opposition opinions to building three casinos in the Catskills).

46. 413 F. 3d 266 (2d Cir. 2005); *cf. City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

47. *Id*. at 267-68.

48. Skibine, *2005 IGRA Exceptions Senate Hearing*, *supra* note 17 at 2-3.

49. *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (rejecting an anti-casino citizen group's attempt to bar the operation of a gaming resort); *see also Indian Tribe Wins Another Battle in Mich. Casino Case*, The Entertainment Litigation Reporter, Feb. 22, 2006 (describing the *TOMAC* case ruling).

50. Brad Knickerbocker, *More Scrutiny of Indian Casino Plans*, Christian Science Monitor, Feb. 7, 2006, at 2.

51. Jeffrey Mize, *Casino Backers, Foes Gird for Meetings this Week*, The Columbian (Clark Co., Wash.), Feb. 12, 2006, at A1.

52. *Id.*

53. Much of the history of the dispute is discussed in *Sokaogon Chippewa Cmty v. Babbitt*, 214 F.3d 941, 943 (7th Cir. 2000).

54. *Sokaogon Chippewa Cmty v. Babbitt*, 961 F. Supp. 1276, 1286 (W.D. Wis. 1997).

55. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 259 F. Supp. 2d 783, 787 (D. Wis. 2003) (describing a settlement agreement which was previously reached in *Sokaogon Chippewa Cmty v. Babbitt*, 961 F. Supp. 1276 (W.D. Wis. 1997)).

56. Jim Puzzanghera, *Senate Panel Wrestles With Urban Casino Issues; Feinstein Opposes Tribe's Plan For San Pablo*, Mercury News (San Jose, Cal.), Apr. 6, 2005, at 15A.

57. Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (2000).

58. John Simerman, *City Hits Jackpot with Bingo*, Contra Costa Times (Cal.), Feb. 21, 2006, at F4.

59. S. 1648, 108th Cong. (2003); S. 113, 109th Cong. (2005); *see generally First Session on S.113 To Modify the Date As of Which Certain Tribal Land of The Lytton Rancheria of California Is Deemed To Be Held In Trust Before the Senate Committee on Indian Affairs*, 109th Cong. (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:21799.wais.

60. Peter Whoriskey, *Tribe Feels Abused by Fallen Lobbyist*, Mercury News (San Jose, Cal.), Jan. 7, 2006, at A7.

61. Mike Dorning, *Abramoff's Plea Renews Focus on Hastert's '03 Casino Letter*, Chicago Tribune, Jan. 5, 2006, at C1.

62. *Id*. The Hastert letter was also signed by Tom DeLay, who was then the majority leader of the House of Representatives; Roy Blunt, who was majority whip; and Eric Cantor, chief deputy House whip. *Id.*

63. Laura Maggi, *Interior Rejects Indian Casino Compact,* Times-Picayune, Mar. 8, 2002, at A1.

64. Peter H. Stone, *K Street Stumble*, The National Journal, Mar. 27, 2004; Scott Dyer, *Final gamble Logansport Casino's Fate Up To Undecided Foster*, Baton Rouge Advocate, Dec. 30, 2003.

65. Dorning, *supra* note 61.

66. *Susan Schmidt and Jeffrey Smith of The Washington Post Discuss the Relationship Between Tom DeLay and Lobbyist Jack Abramoff*, PBS, Fresh Air, Feb. 1, 2006.

67. Susan Schmidt, *Casino Bid Prompted High-Stakes Lobbying*, Wash. Post, Mar. 13, 2005, at A1.

68. *See Schmidt and Smith*, *supra* note 66. *See also generally*, *Oversight Committee Hearings on In re Tribal Lobbying Matters, et al.: Comm. on Indian Affairs*, 109th Cong. (2005), *available at* <http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1>.

69. Michael Crowley, *A Lobbyist in Full*, N.Y. Times, May 1, 2005, at 32.

70. *Id*.

71. Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, Wash. Post, Jan. 4, 2006, at A1; *See also* Alice Fisher, *Justice Department News Conference on Abramoff Guilty Plea*, Wash. Post, Jan. 3, 2006, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010301029.html>.

72. John Cochran, *Scrutiny on Tribes Keeps Stakes High*, Congressional Quarterly Weekly, Jan. 27, 2006.

73. H.R. 2353 § 6, 109th Cong. (2005). *See generally Rep. Rogers Renews Call for Indian Gambling Reform*, U.S. Fed. News, Jan. 5, 2006. Senator Vitter of Louisiana has introduced his own version of the Common Sense Indian Gambling Reform Act, S. 1260, 109th Cong. (2005).

74. H.R. 2353, 109th Cong. § 5-6 (2005).

75. H.R. 3431, 109th Cong. (2005).

76. S. 2078, 109th Cong. § 10 (2005).

77. Cong. Rec. S13390 (Nov. 18, 2005).

78. S. 2078, 109th Cong. §10 (2005).

79. Cong. Rec. S13390 (Nov. 18, 2005).

80. Steven Schultze, *Reform Trend May Curb Casino Plans*, Milwaukee Journal Sentinel (Wis.), Feb. 11, 2005, at 1.

81. *See* 109th Cong. H.R. Discussion Draft To Amend the Indian Gaming Regulatory Act to Restrict Off-Reservation Gamily, and for other Purposes, *available at* <http://resourcescommittee.house.gov/subcommittees/naia/nativeamer/discussiondraft2offreservationraming.pdf>.

82. *Id.*

83. John Simerman, *Pombo's Fund-Raising Efforts*, Contra Costa Times (Cal.), Jan. 21, 2006, at F4.

84. lan K. Ota, *Pombo Chided for Lax Oversight of Gambling*, Congressional Quarterly Today, Dec. 14, 2005.

85. Tony Batt, *McCain Pushes Officials on Off-Reservation Gambling Rules*, Las Vegas Review-Journal, Feb. 2, 2006, at 1D.

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2006 Committee on Attorneys in Public Service Annual Meeting Programs

James Costello of the NYS Court of Appeals

Susan Herman

On January 25, 2006, the Committee on Attorneys in Public Service hosted its Annual Meeting educational programs and award ceremony. Under the direction of program chairs Donna J. Case of Utica and James Costello of Albany, the committee presented two educational programs, which attracted 100 attendees. The programs were "The Supreme Court 2005: The Changing of the Guard" and "Current Legal Issues in Governmental Reform: Judicial Elections, Public Authorities and State Government."

Noted scholars Brooklyn Law Professor Susan Herman (Centennial Professor of Law) and Burt Neuborne (John Norton Pomeroy Professor) of New York University Law School presented the Supreme Court review session. The "Current Legal Issues in Governmental Reform" was moderated by CAPS vice chair Patricia Salkin (Associate Dean and Director, Government Law Center of Albany Law School). The panelists included Dean John Feerick (former Dean, Fordham Law School), who chaired the Commission to Promote Public Confidence in Judicial Elections; Fern Schair, Chair, Board of Directors, The Fund for Modern Courts; Ira Millstein, Weil Gotshal and Mendes; The Honorable Richard Brodsky of the New York State Assembly (Chair, Committee on Corporations, Authorities and Commissions); Albany Law School Professor Michael Hutter and Jeremy Creelan of the Democracy Program at the Brennan Center for Justice in New York.

Burt Neuborne (above) and Susan Herman (below) speak with attendees after their session

Professor Patricia Salkin introduces Ira Millstein and Assemblyman Richard Brodsky

Carl Copps, James Horan and Marjorie McCoy enjoy Professors Herman's and Neuborne's presentation

Susan Herman of Brooklyn Law School and Burt Neuborne of New York University Law School

Alicia Klingaman

Judge Judith Kaye

Judge Richard Sise

Lt. Col. Robert A. Moscati

Judge Jonathan Lippman and Patricia Salkin

The Committee also hosted its annual "Awards for Excellence in Public Service." Awards were presented to The Honorable Jonathan Lippman, Chief Administrative Judge of the State of New York; David Klingaman (posthumous award), New York State Court of Claims; and the Office of the Staff Judge Advocate of the 42nd Infantry Division.

Patricia Salkin and Vincent Buzard

The awards event was hosted by CAPS chair, the Honorable James F. Horan, ALJ, and featured State Bar President A. Vincent Buzard.

James Horan and James Costello

James Horan, Judge Lippman and Vincent Buzard

Carl Copps, Anne Reynolds Copps and James Horan

Judge Sise (NYS Court of Claims) and James Horan

John Feerick, past CAPS Chair Tricia Troy Alden, Judge Jonathan Lippman and Judge Judith Kaye at the reception

Judge Lippman and Vincent Buzard

Robert G. Conway, Jr., Lt Col. Robert A. Moscati, James F. Horan and Vincent Buzard

Judge Judith Kaye, Judge Jonathan Lippman, NYSBA President Vincent Buzard and James Horan

Peter Wrede, Thomas Rienzo, Judge Richard Sise (rear), Jessica Klingaman (front), Vincent Buzard, Alicia Klingaman (rear); Judge Susan Read (front), James Horan, Moira Rienzo (nee Klingaman), David L. Klingaman, Sheila Wrede (nee Klingaman)

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