No. 12-

IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the 300,000-acre ancient Oneida reservation in New York still exist, neither disestablished nor diminished, despite (1) the federal government's actions taken in furtherance of disestablishment (including, but not limited to, the 1838 Treaty of Buffalo Creek); (2) this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*") that the Oneida Indian Nation of New York cannot exercise sovereignty over lands it purchases in the ancient reservation area; and (3) this Court's finding in that case that land in the ancient reservation area has not been treated as an Indian reservation by the federal, state or local governments for nearly two centuries?*

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*This Court twice previously granted petitions for certiorari in which the Oneida reservation disestablishment / diminishment question was framed as: "Whether the ancient Oneida reservation in New York was disestablished or diminished?" *Madison County v. Oneida Indian Nation of New York,* Docket No. 10-72, 131 S. Ct. 459, October 12, 2010, and "Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneidas' alleged New York reservation," *Sherrill*, Docket No. 03-855, 542 U.S. 936, June 28, 2004.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The State of New York appeared as *amicus curiae* in the Second Circuit in support of the Counties. The United States appeared as *amicus curiae* in the Second Circuit at the request of the court.

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JURISDICTION

The judgment in the court of appeals was entered October 20, 2011. Madison and Oneida Counties' ("the Counties") petition for rehearing *en banc* was denied August 16, 2012 (Pet. App. at 216a-217a).

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Serious Question That Needs To Be Answered

In 1985 four members of this Court examined the historical record concerning the Oneidas' removal from New York in the mid-19th Century and concluded:

> There is also a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838,

> which ceded most of the Tribe's lands in Wisconsin to the United States in exchange for a new reservation in the Indian Territory. The Treaty provided that the new reservation lands were to provide "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." 7 Stat. 551, Art. 2. "These proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas."

County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 269 n.24 (1985) (Stevens, J. dissenting).

That serious question has not been answered by this Court in the intervening twenty-seven years despite several opportunities. Indeed, this Court twice agreed to review the 2003 decision of the court of appeals in which a divided panel concluded that the Oneidas' ancient reservation in central New York, spanning 300,000 acres, is neither disestablished nor diminished and is intact. Pet. App. at 102a-172a.[1] That decision was rendered without the benefit of this Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill*"). *Sherrill* surveyed the same historical record of the Oneidas in New York and made various findings that irreconcilably conflict with the court of appeals' historical analysis and its conclusion that an extant reservation exists.

1. Judge Van Graafeiland dissented.

In *Sherrill*, this Court observed: "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." 544 U.S at 202 (emphasis added). This Court in *Sherrill* used "historic" or "ancient" to describe the Oneidas' former reservation in New York, which was last occupied by the Oneidas in the mid-19th Century. 544 U.S. at 202, 213. The *Sherrill* Court further noted the "*distinctly* non-Indian character of the area and its inhabitants" and "the regulatory authority constantly exercised by New York State and its counties and towns." *Id.* at 202 (emphasis added).

The court of appeals' pre-*Sherrill* recognition of a "not disestablished reservation" creates a legal fiction that is belied by the historical record in *Sherrill*. The court of appeals' decision recognizes the 1788 boundaries of the Oneidas' ancient reservation and brings within the reservation's borders 450 square miles of central New York lands that are distinctly non-Indian in character and that have been occupied by non-Indians and governed by New York State and its political subdivisions for the better part of two centuries. Its decision not only irreconcilably conflicts with this Court's decision in *Sherrill*, *see* Reasons for Granting Petition Point I, *infra*, but also misapplies and misapprehends this Court's disestablishment/diminishment jurisprudence, *see* Point II, *infra*. Moreover, the Oneida Indian Nation of New York (OIN)[2] is actively pressing the existence of a "not disestablished" reservation in pending litigation bearing on tax liability

2. OIN refers to the Respondent, the present-day Oneida Indian Nation of New York. "Oneida" or "Oneidas" refers to the ancient or historic Oneida Nation.

under state law, eligibility to have lands taken into trust under the Indian Reorganization Act (25 U.S.C. § 465) and land transfers under the Federal Property and Administrative Services Act of 1949, and continues to claim sovereignty over its ancient reservation lands in disregard of this Court's ruling in *Sherrill*, including by having the U.S. Census Bureau re-map 450 square miles of land in Central New York as the legal boundary of an intact Oneida reservation. *See* Point III, *infra*.

B. Procedural History

1. *Sherrill*

This Court in *Sherrill* reviewed the court of appeals' 2003 ruling but found it unnecessary to reach the disestablishment question since *Sherrill* barred the OIN from exercising sovereignty in whole or in part over reacquired ancient reservation lands. *Id.* at 202-03; *see id.* at 207-11 (detailed pre-*Sherrill* procedural history).[3]

2. Post-*Sherrill*

Notwithstanding this Court's holding in *Sherrill* that the recently-purchased fee lands were subject to the taxing and regulatory authority of New York State and its political subdivisions, the OIN has continued to refuse

3. OIN had argued that it was entitled to exercise tribal sovereignty over fee lands that it recently purchased from non-Indians because those lands fell within the ancient Oneida reservation, theorizing that its current possession could be unified with unextinguished aboriginal title to create "Indian country" on a parcel-by-parcel basis. *Sherrill* rejected this theory and altogether barred the OIN from exercising sovereignty over the lands in question. *See* 544 U.S. at 219-221.

to pay the real property taxes that it lawfully owes. The accumulating unpaid real property taxes exceed $100 million in the two Counties and affected school districts. And even though *Sherrill* expressly upheld the City of Sherrill's right not only to impose real property taxes but also to foreclose on the tribally-owned properties for non-payment, 544 U.S. at 214 n.7, the OIN successfully argued in the district court and in the court of appeals that tribal sovereign immunity from suit barred foreclosure. The court of appeals viewed this Court's precedents as creating a rule of law that "defies common sense," namely, that "[a]n Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed." Pet. App. at 100a (Cabranes and Hall, J.J., concurring).

3. *Madison County* Docket No. 10-72 (2010) and Remand to Court of Appeals

This Court granted the Counties' petition for a writ of certiorari, agreeing to hear the disestablishment/diminishment question as well as the sovereign immunity question. The OIN, in a transparent tactic to avoid review in this Court, informed this Court (when the Counties' merits brief was at the printer) that the OIN had passed a tribal ordinance purporting to waive its immunity from suit with respect to current and future tax foreclosure proceedings in each county. This Court then vacated the underlying 2010 court of appeals' decision and remanded the case for further proceedings.

On remand, the court of appeals rejected the OIN's due process challenge to the foreclosure procedures employed by the Counties and ordered the district court

to remand to state court the OIN's claim that the lands are immune from real property taxes under New York law.[4] The court of appeals also affirmed the dismissal of the Counties' counterclaims seeking a declaration that the ancient Oneida reservation has been disestablished or diminished.[5] The court of appeals considered itself bound by the 2003 divided panel decision. The Counties' request for *en banc* review was denied.

The Counties now seek the long-delayed review of the court of appeals' 2003 decision (adhered to in 2010 and 2011) that the Oneidas' ancient reservation has neither been disestablished nor diminished but remains intact in central New York. The need for review in this Court has only grown, even as OIN's claims have been narrowed. The "not disestablished" status for the Oneidas' "ancient" and "historic" reservation, "last possessed by the Oneidas as a tribal entity in 1805," *Sherrill*, 544 U.S. at 202, creates a self-contradictory legal fiction unrecognizable in the

4. The OIN withdrew its argument that the Indian Trade and Intercourse Act barred the foreclosure actions.

5. Madison County asserted its counterclaim in November 2003 seeking a declaratory judgment "that the former Oneida reservation has been disestablished as to the subject lands and that the lands reserved to the Oneidas in the Treaty of 1788, including the subject lands, are neither Indian Country nor part of an Indian Reservation." Madison County Answer (11-5-03) (set forth in the Second Circuit Joint Appendix, No. 05-6408-cv(L), at A208-09). Oneida County filed a virtually identical counterclaim in 2005 as part of its answer in a subsequent action commenced by OIN seeking injunctive relief preventing Oneida County from foreclosing on property owned by OIN for non-payment of taxes. *See* Oneida County Answer (8-29-05) (set forth in the Second Circuit Joint Appendix, No. 05-6408-cv(L), at A1457-1460).

law: it is a reservation over which the tribe exercises no sovereignty. The quintessential feature of an Indian reservation is tribal sovereign authority over tribal lands. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 n.12 (1982) ("Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty."); *see generally United States v. Mazurie*, 419 U.S. 544, 557 (1975) (observing "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory….").

The inherent ambiguity of this artificial construct fuels conflict in the form of competing assertions of sovereignty. The OIN, buoyed by the court of appeals' ruling, purports to assert tribal sovereign authority over the lands that it purchases within the reservation area, in direct contravention of this Court's holding in *Sherrill*. This conflict is in the nature of a border dispute between two states, *see, e.g., Louisiana v. Mississippi*, 516 U.S. 22 (1995), although the OIN's sovereign powers are severely circumscribed as a "quasi-sovereign." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). The jurisdictional disputes are substantial, numerous, and growing, as detailed in Point III, *infra*.

Resolution of this dispute is needed now to avoid further escalation in the jurisdictional battles and provide clear guidance to the Counties, cities and towns on the one hand, and the OIN on the other. *See generally Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 14 (2009) (reaching issue because "deciding the matter now will reduce the likelihood of further litigation"). Given the number of ancient Indian reservations in New York (and

other eastern states) and related claims by tribes, a decision from this Court also is needed to provide guidance to the broader constituency of governments and tribes struggling with these issues. *See* Point III.C, *infra*.

This Court is in a position to lift the confounding veil of the ancient "not disestablished" "intact" reservation and make clear that the large swath of central New York in question, which has been treated as non-Indian land under the governance of New York State for nearly two centuries, remains so today. The path to that resolution may be found through the application of traditional disestablishment/diminishment case law and consideration of the historical record as found in *Sherrill*, including but not limited to the intent and impact of the 1838 Treaty of Buffalo Creek, or by applying the equitable principles in *Sherrill* to bar restoration of a 21st Century reservation that long ago ceased to exist.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' RULING CONFLICTS WITH *SHERRILL*.

The court of appeals' decisions in 2010 and 2011 – by adhering to a prior divided decision that "the Oneidas' reservation was not disestablished," Pet. App. at 67a (quoting *Sherrill*, 337 F.3d at 167) – conflict with this Court's decision in *Sherrill*. The court of appeals' legal conclusion that a 300,000-acre Oneida reservation exists today in central New York cannot be reconciled with this Court's holding in *Sherrill* that the OIN cannot exercise sovereignty in whole or in part over those lands. Tribal jurisdiction over reservation land is essential for any

legally cognizable reservation. Indeed, to say the OIN has an extant reservation but the tribe is unable to exercise tribal jurisdiction over it, is to articulate an untenable, contradictory legal concept of an Indian reservation. It is a legal fiction not elsewhere recognized in the law and can only confound and confuse and lead to further disputes and lawsuits. Moreover, this Court's historical findings with respect to "the area that once composed the [Oneidas'] historic reservation" bar any factual finding that a reservation exists today. *Sherrill*, 544 U.S. at 202, 206-09.

Traditional disestablishment and diminishment principles support a declaration that the Oneidas' reservation no longer exists, *see*, *infra*, Point II, but even if they did not, this Court should apply the federal equity principles articulated in *Sherrill* to bar the restoration of an Oneida reservation. Recognizing a 450-square-mile reservation in central New York is highly disruptive to the settled expectations of the citizens and governments within the "not disestablished" reservation area, given that these lands have been settled, developed, owned, taxed, and regulated by non-Indians for the past 150-200 years. The same principles of laches, impossibility, and acquiescence that led this Court to hold the OIN cannot exercise sovereignty in whole or in part over the claimed reservation lands, 544 U.S. at 202-03, 214-21, apply equally to bar restoration today of a claimed "intact" 300,000-acre reservation, even without a formal determination that the reservation was disestablished or diminished. The massive disruption of settled expectations here is precisely the harm that *Sherrill* sought to avoid.

II. THE COURT OF APPEALS' DISESTABLISHMENT ANALYSIS CONFLICTS WITH THIS COURT'S DISESTABLISHMENT PRECEDENT.

A. The Historical Record and Factual Findings Pertinent To Disestablishment/Diminishment

This Court in *Sherrill* reviewed the history of the Oneidas' reservation in New York, including its creation under New York law in 1788 (Treaty of Fort Schuyler) during the confederal period; the later negotiation of the Treaty of Canandaigua in 1794 between the United States and Six Nations (including the Oneidas); and the process by which the Oneidas' reservation lands were sold to New York State as the holder of the right of preemption. *See* 544 U.S. at 203-07; *see also* Petitioners' Merits Brief Docket No. 10-72 at 35-41 (providing detailed account of the creation of the reservation in 1788 under New York law). Whether the ancient Oneida reservation is deemed a state reservation or a federal reservation or a creature of both in some respects, the historical record shows both governments—state and federal—promoted settlement of the Oneida reservation. "[E]arly 19th-century federal Indian agents in New York State … 'took an active role … in encouraging the removal of the Oneidas … to the west.'" *Sherrill*, 544 U.S. at 205-206 (quoting *Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 390 (1978)). At least as early as 1808—three decades before the Treaty of Buffalo Creek—the federal government and New York were of a single mind to "mov[e] Indians from the east to the newly acquired lands in the west." *Oneida Nation of New York,* 43 Ind. Cl. Comm. at 389.

The federal removal policy found full expression in the 1830 Removal Act (4 Stat. 411) which "authorized the President to convey land west of the Mississippi to Indian tribes that chose to exchange the lands where they now reside, and remove there." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999). In this Act, Congress made clear its intent to remove Eastern tribes (those located east of the Mississippi) to new reservations west of the Mississippi, and make their Eastern reservations available for settlement. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 623-25 (1970) (noting Removal Act unambiguously reflected federal policy to force relinquishment of Indian property rights).

As this Court observed in *Sherrill*, the 1838 Treaty of Buffalo Creek (Act of Jan. 15, 1838, 7 Stat. 550) "envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas." 544 U.S. at 206.[6] And in keeping with the Treaty's intent, most Oneidas in New York made "satisfactory arrangements" with New York State for the "purchase of their lands at Oneida." *Id*. Some Oneidas

6. The 1838 Treaty's preamble notes the Indians' recognition of the pressures they faced from white settlement and development, and their need to "seek a new home among their red brethren in the West." Pet. App. at 229a. The preamble further recounts that the United States previously secured lands in the Territory of Wisconsin to provide a new home for the Six Nations (including the Oneidas) removing from New York. *Id.* at 229a-230a. The preamble provides that the Six Nations will remove instead to the Indian territory west of the Mississippi. *Id.* at 230a. The final whereas clause acknowledges President Van Buren's embrace of the federal policy of removal. Articles 2 and 5 set out the Oneidas' rights and obligations in removing; Article 13 lays out the compensation terms, with the Oneidas to make arrangements with New York State, which held the right of preemption, to sell their lands.

stayed in New York after the proclamation of the Buffalo Creek Treaty but they "continued to diminish in number and during the 1840's, sold most of their remaining lands to the State." *Id.* at 206-07 (citing *New York Indians v. United State*s, 40 Ct. Cl. 448, 458, 469-71 (1905)). "A few hundred Oneidas moved to Canada in 1842 and 'by the mid-1840s, only about 200 Oneidas remained in New York State.'" *Id.* at 207 (internal citations omitted) (quoting Introduction to Part I, The Oneida Indian Journey: From New York to Wisconsin, 1784–1860 9, 13 (Laurence M. Hauptman & L. Gordon McLester III eds., 1999)). "By 1843, the New York Oneidas retained less than 1,000 acres in the State." *Id.* "That acreage dwindled to 350 in 1890; ultimately, by 1920, only 32 acres continued to be held by the Oneidas." *Id.* By the late 19th or early 20th Century, the Oneidas "as a tribe" were "known no more" in the State of New York. Felix S. Cohen, Handbook of Federal Indian Law, 416-17 n.1, (1942); Felix S. Cohen, Federal Indian Law, 966-67 n.1 (1958); *see also Sherrill*, 544 at 205-07.

The historical record thus shows the 1838 Treaty was part of a long-standing federal policy to remove all Indians from New York and other eastern States, and was a natural step in the removal process that had diminished the Oneida reservation by 98% as of 1838. *See Sherrill*, 544 U.S. at 206. The record regarding implementation of the 1838 Treaty shows the Oneidas sold 80% of their remaining lands to New York State within five years of signing the Treaty. *See id.* at 206-07. The historical record also demonstrates the subsequent development of the former reservation, including the flood of non-Indian settlers and loss of any Indian character, as this Court observed in *Sherrill*, 544 U.S. at 202, 211, 216-17, 221.

See Petitioners' Merits Brief Docket No. 10-72 at 51-52.[7] Except possibly for the thirty-two acres, there has been no Oneida reservation in New York and the area is and has been under non-Indian jurisdiction for nearly 200 years.

B. The Court Of Appeals' 2003 (Pre-*Sherrill*) Flawed Analysis of Disestablishment

The court of appeals' decision gives almost no weight to the federal removal policy that motivated and informed the 1838 Treaty, *see* Pet. App. at 146a-147a; is equally or more dismissive about the subsequent history that confirms the Oneidas' post-1838 land sales and nearly complete removal from New York State, *see id*. at 146a-148a[8]; and mis-

7. Such historical developments are properly considered in analyzing disestablishment or diminishment. *See* Petitioners' Merits Brief Docket No. 10-72 at 47-56; s*ee also Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Solem v. Bartlett,* 465 U.S. 463 (1984)*; Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

8. The court of appeals incorrectly stated that "the sales to New York State were never accomplished, and the planned removal never took place." Pet. App. at 144a; *but see Sherrill*, 544 U.S. at 207. The large number of Oneidas who resettled in Wisconsin on a newly-created federal reservation carried with them the Oneida tribal organization and continued to have a relationship with the federal government there. *See* The Oneida Indian Experience: Two Perspectives 83 (Jack Campisi & Laurence M. Hauptman eds., 1988); The Oneida Indian Journey from New York to Wiscosin 1784 – 1860, *supra* p. 12, at 53-83; Laurence M. Hauptman, Conspiracy of Interests 213-14 (1999); Department of the Interior Appellees Brief, *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, Nos. IBIA 10-91, 10-92, 10-107 (IBIA Sept. 27, 2010) (submitted in *New York v. Salazar,* No. 08-cv-644 (N.D.N.Y. Nov. 15, 2011), ECF No. 247-2 (detailing federal supervision and control over Oneida reservation in Wisconsin and Oneida Tribe of Indians of Wisconsin).

applies this Court's jurisprudence on disestablishment/diminishment in construing the 1838 Treaty.

The court of appeals mistakenly emphasized that "[t]here is no specific cession language, and no fixed-sum payment for opened land in New York …." Pet. App. at 142a-143a (calling Article 13 compensation terms "speculative" and observing the "President had never fixed a time for …removal…."). The court of appeals cited a federal surplus land act case, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) to support the probative value of specific cession and compensation terms, noting that such language "can be helpfully probative, *particularly when buttressed by fixed compensation for the opened lands.*" Pet. App. at 137a-138a (emphasis added). But in *Solem* and every other surplus land act case, this Court (and other courts) addressed a federal statute that opened up a reservation on federal lands in the West, and had to determine whether Congress had intended to disestablish an Indian reservation when it enacted the statute.

In passing surplus land acts in the late 19th and early 20th Century, Congress was not implementing federal removal policy. Rather the tribes all remained on their reservations but with reduced land holdings. In that peculiar setting, Congress might or might not intend to diminish or disestablish the reservation. In contrast, in early 19th Century treaty-making with Eastern Indians, the Executive Branch directly carried out unambiguous federal policy to force Eastern tribes to give up their reservations in the East for new reservations west of the Mississippi. In that context there is no ambiguity as to the federal government's intention to disestablish the Eastern reservations to allow settlement, or at the very least diminish the reservations to the extent Indians

actually removed. Because of the substantial differences in the historical and legal contexts for disestablishing Western reservations under federal surplus land acts and disestablishing Eastern reservations pursuant to state and federal treaties, this Court should not apply disestablishment standards under surplus land acts to Eastern reservations but should apply the intent of the federal government as expressed in treaties in the early 19th Century.

Only in the surplus land act context could Congress set forth specific cession and compensation terms because the reservations were created on federal public lands, and upon being opened, the United States held the right to purchase the land. No such terms could be included in the 1838 Treaty because the Oneida reservation was initially State-created, New York held the right of preemption, and New York was not a party to that Treaty. As a result, the language of the 1838 Treaty was necessarily different from surplus land act cases involving Western tribes. The most the United States could require of the Oneidas was that they "make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Pet. App. at 238a.

Furthermore, because most New York Oneidas actually sold their lands in New York and removed from New York, as understood and agreed in the Treaty, the declaration of Commissioner Ransom Gillett, reporting that some New York Oneidas were told they did not have to leave New York, Pet. App. at 143a-144a, is of no legal consequence. Moreover, Gillett's declaration, executed after the 1838 Treaty was signed, conflicts with the plain language of the Treaty. Even if his declaration were given effect, it would apply only to the remaining Oneida

lands as of 1838 and not to lands sold in the previous forty-five years. *See Sherrill*, 544 U.S. at 206 (noting Gillett stated they could choose to "remain *where they are* forever.") (emphasis in original). And in a report to the Commissioner of Indian Affairs less than a year after obtaining the Oneidas' consent to the amended treaty, Gillett stated that although individual members of certain tribes could remain on unsold land during their lifetime, "[t]he rising generation, however, would not be embraced in the provisions of that proposition and would have to seek homes in the new country." Supreme Court Joint Appendix Docket No. 10-72 at JA193a.

It certainly would have come as a surprise to the federal agents negotiating the 1838 Treaty, the Oneidas, and New York State that the 1838 Treaty had no impact whatsoever on the Oneidas' landholdings in New York, and furthermore managed to resurrect an undiminished 300,000-acre reservation that had not existed even then for nearly half a century.

III. UNLESS CLARIFIED BY THIS COURT, THE "NOT DISESTABLISHED" RESERVATION WILL CONTINUE TO CONFOUND COURTS AND DISRUPT SETTLED EXPECTATIONS IN THE CLAIMED RESERVATION AREA.

A. The "Not Disestablished" Oneida Reservation Is A Legal Fiction Unrecognizable In Federal Indian Law.

In declaring that the OIN cannot exercise sovereignty "*in whole or in part*" with respect to its former reservation lands held in fee, this Court recognized that those lands

lack an essential characteristic of an existing Indian reservation – the ability of the tribe to exercise tribal jurisdiction over it. *See*, Point I, *supra*. Not only is tribal jurisdiction over tribal lands an essential element of an Indian reservation under this Court's jurisprudence, numerous federal laws and regulations embody that requirement, together with the equally fundamental requirement that the federal government, through the Bureau of Indian Affairs (BIA), exercise jurisdiction over the reservation lands. *See, e.g.*, 33 U.S.C. § 1377(h) (Clean Water Act) and 7 U.S.C. § 2012 (Food Stamps); *see also* 18 U.S.C. § 1151 (defining Indian country to include "all lands within the limits of any Indian reservation *under the jurisdiction of the United States Government*.…") (emphasis added).

Here, the subject lands have none of the defining legal characteristics of an Indian reservation. They are not: (1) under BIA jurisdiction; (2) held in trust or restricted fee[9]; (3) under tribal jurisdiction or (4) immune from state and local jurisdiction or taxation. Instead the parcels have been under the taxing and regulatory jurisdiction of New York State and its political subdivisions for 150-200 years, as this Court found in *Sherrill*. By every measure, then, the OIN's "not disestablished reservation" is not a recognizable Indian reservation in any factual, practical or conventional legal sense. The purported "not disestablished reservation" is a reservation by historical

9. The DOI rejected the OIN's request to hold title in restricted fee. Unless and until the DOI takes OIN-owned fee lands into trust, all such lands within the "not disestablished reservation" are indistinguishable from all other fee lands in the Counties and are equally subject to state and local taxation and regulation.

reference only, and finds expression only in the negative ("not disestablished"). As a matter of historic fact, federal law, and common sense, there is no 300,000-acre Oneida Indian reservation in central New York today. *See Sherrill*, 544 U.S. at 202-03. The court of appeals' divided decision in *Sherrill* declaring the reservation was "not disestablished" is properly viewed as articulating a legal fiction belied by this Court's factual findings in *Sherrill*.[10]

This Court should clarify the legal status of this "not disestablished reservation" and hold that, consistent with recognized federal definitions of an Indian reservation, no Oneida Indian reservation exists in central New York with the possible exception of the 32-acre "Oneida Territory" in Madison County.[11]

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10. While the law occasionally recognizes certain legal fictions to achieve utilitarian purposes – for example, the "fertile octogenarian" which helps to define the class of beneficiaries who can take under a trust instrument pursuant to the rule against perpetuities – such legal fictions are designed to achieve efficiencies in the law and are benign on their face. Here, the fictional legal construct of a "not disestablished reservation" is inherently confusing and provokes disruption, discord, conflict and litigation.

11. Title to the 32-acre "Oneida Territory" has been held in fee by individual Oneida Indians, almost without interruption, since the mid-19th Century. *See Sherrill*, 544 U.S. at 207.

B. Perpetuating The Legal Fiction Of A "Not Disestablished" Reservation Is Highly Disruptive.

The legal construct of a 300,000-acre "not disestablished reservation" over which the state and its political subdivisions exercise exclusive sovereignty engenders uncertainty and confusion in all quarters and inevitably promotes conflict between Indian and non-Indian communities. The OIN seeks to exploit this dysfunctional and ambiguous legal fiction in pending federal and state litigation, *see* Point III.B.1, *infra*, and as part of the tribe's overt campaign to re-establish sovereignty over the entire historic reservation, including most visibly in its recently initiated and continuing efforts to get the U.S. Census Bureau to re-map central New York to depict a 307,000 acre, 450 square mile, "intact" Oneida reservation whose legal boundaries encompass the northerly half of Madison County, the westerly third of Oneida County and extend deep into Lewis County—with potentially profound impacts on population statistics and federal funding. *See* Point III.B.2, *infra*. Moreover, the "not disestablished" status of the Oneidas' reservation creates uncertainty across a broad range of federal programs that assume a tribe has a real reservation with the ability to exercise jurisdiction over it. These include federal environmental laws, public health and safety laws, and a vast array of federal programs that are directed to Indians who live "on or near a reservation." *See* Point III.B.3, *infra*. Removing the confounding cloud of a "not disestablished reservation" in central New York would greatly benefit all stakeholders in central New York by clarifying the rights and obligations that depend on reservation status.

1. OIN Seeks To Exploit the Legal Fiction Of A "Not Disestablished Reservation" In Pending Litigation

a. State Court Tax Assessment Litigation

The OIN has asserted in state court the Tribe's "not disestablished" federal reservation as *the* reason the lands are not taxable under state law. The OIN contends all of the land within the historic reservation's boundary is Indian Country within the meaning of 18 U.S.C. § 1151, subjects its fee lands to the restrictions of the Indian Trade and Intercourse Act, and therefore makes the lands—not recognized as an Indian reservation by New York for two centuries—an Indian reservation for the purpose of certain state-law real property tax exemptions. Indeed, the district court previously accepted OIN's argument and held that the disputed lands were immune from taxation under New York statutes conferring immunity on any tribally owned real property "in [an] Indian reservation." Pet. App. at 210a (applying N.Y. Real Prop. Tax Law § 454 and N.Y. Indian Law § 6). Although that district court decision was vacated by the court of appeals in its 2011 decision upon remand from this Court,[12] and even though a New York state court, in analyzing whether the OIN lands qualify for tax-exempt status under state law, is not bound by the court of appeals' pre-*Sherrill* determination that a "not disestablished" reservation exists, the OIN nevertheless will continue to press this argument as the cornerstone of its claim to tax immunity under state law.

12. The court of appeals remanded this issue to the district court and ordered it not to exercise supplemental jurisdiction over these state law claims and to dismiss without prejudice to their being brought in state court. *See* Pet. App. at 69a.

b. Federal Land-Into-Trust Litigation (N.D.N.Y.)

The OIN seeks to employ the "not disestablished" reservation ruling to support its position in litigation over the Interior Secretary's decision to take 13,000-acres into trust for the benefit of the OIN (the Counties and the State are challenging that decision in the Northern District of New York).[13]

First, the OIN contends that the legal determination of an extant federal reservation translates into a finding that the OIN was under federal jurisdiction in 1934 for purposes of *Carcieri v. Salazar*, 555 U.S. 379 (2009). This legal argument is made without regard to the contemporaneous historical records in 1934 that show the few Oneidas who remained in New York were living non-tribally, scattered across the state, and were not receiving services from the federal government.[14] In this way the OIN seeks to extrapolate (bootstrap) one legal fiction into another.

Second, as reflected in the Secretary's Record of Decision (ROD), the OIN successfully argued, based on its "not disestablished reservation," that its application should be treated as an "on-reservation" application and thus evaluated under the more lenient provisions in 25 C.F.R. § 151.10, rather than the stricter provisions in 25 C.F.R. § 151.11 that apply to "off-reservation" applications.

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13. *See* Plaintiffs' Second Amended and Supplemental Complaint (sixth cause of action), *New York v. Salazar*, No. 08-cv-644 (N.D.N.Y. Feb. 12, 2009), ECF No. 94.

14. *See* Cohen, *supra* p. 12.

See Supreme Court Joint Appendix Docket No. 10-72 at JA272a-73a.[15]

Third, the OIN relied on its "not disestablished" reservation to secure eighteen acres of excess federal lands in Verona, New York, under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 523. That act gives tribes priority in claiming excess federal land if located within their reservation. The federal government took the land into trust for the OIN in the middle of the pending land-into-trust litigation to counter an argument, advanced by the State and Counties, that the OIN was ineligible to have lands taken into trust under the Indian Land Consolidation Act because it had no existing trust lands in New York.

2. OIN Is Lobbying The U.S. Census Bureau To Re-Map Central New York To Depict An Extant 307,000 Acre Reservation

The claimed 300,000-acre Oneida reservation in central New York is an organizing principle for the OIN, as the Tribe seeks to reestablish a vast Indian reservation for its approximately 1,000 members.[16] The OIN has

15. For example, under Section 151.11(b), the Secretary of the Interior shall give greater weight to the concerns raised by state and local government regarding potential impacts on regulatory jurisdiction, real property taxes and special assessments where the land is not within or contiguous to the reservation boundaries.

16. In opposing the Counties' petition seeking *en banc* review of the 2011 court of appeals' decision, the OIN argued that the Second Circuit should not revisit that decision and "inject uncertainty into the lives of those – members of the Nation and others – who *depend* on the reservation and have relied on [the]

openly stated its long-term goal is to reestablish tribal sovereignty over *all* of the historic reservation, using tax free revenue from its Turning Stone Casino to purchase lands. To date, the OIN has purchased some 17,000 acres within the claimed reservation area. As one OIN tribal council member publicly described it, "[t]he mission of the Nation has been to to get back the whole reservation … that's 280,000 acres." Jeff Wise, *The New Revolution Ford Fusion Hybrid 2010*, My Ford, Fall 2009, at 12, 17. The OIN is well aware that census maps and population data provide important data points in Indian litigation, including in *Sherrill*. *See* 544 U.S. at 211 (noting area in question is 99% non-Indian, citing then current census figures). Armed with the court of appeals' 2010 view of the 2003 ruling as "the law of this circuit,"[17] the OIN pressed for official recognition of the reservation's purported legal boundaries unchanged since 1788. Specifically, the OIN

2003 decision to settle the matter." OIN's Response in Opposition to Petition for Rehearing En Banc (Nov. 29, 2011), at 9 (emphasis added). The OIN has never explained how its 1,000 members "depend" on the existence of a factually non-existent reservation of 300,000 acres over which the tribe exercises no sovereign authority. Moreover, the OIN's membership today represents a small fraction of the approximately 20,000 21st Century Oneidas living in the United States and Canada who descended from the historic Oneida Nation, making the OIN's claim to the entire 300,000-acre ancient reservation grossly disproportionate to its arguable historical interests in the land.

17. *See* Press Release from OIN, *Oneida Nation Responds to Successful Second Circuit Ruling*, Aug. 21, 2012, http://www.oneidaindiannation.com/pressroom/releases/Oneida-Nation-Responds-to-Successful-Second-Circuit-Court-Ruling-166918626.html (stating "ruling puts an end to more than a decade of litigation over the existence of the Oneida reservation.")

sent a letter to the U.S. Census Bureau, dated June 15, 2010, stating:

> The Oneida Nation of New York is in receipt of the US Census Bureau Map which purports to depict the Oneida Nation Reservation. Please be advised the Oneida Reservation, as recognized by the Federal Government and United States District Courts, is a 300,000 acre reservation, I have enclosed for your- reference a copy of a map prepared by the Department of Interior, Bureau of Indian Affairs, which depicts the Oneida Nation Reservation. This map reflects the legal boundary of the Oneida Nation. Please correct the US Census records to accurately reflect the Oneida reservation.

The Census Bureau, with direction and support from the Department of the Interior, agreed to redraw official Census maps to depict an undiminished federal reservation of more than 300,000 acres instead of the 32-acre "Oneida Territory" previously shown on official government maps for many decades, which had reflected historical reality and the actual character and jurisdiction of the lands.

The re-drawing of the claimed reservation's legal boundaries was accomplished without notice to the State or Counties, and without regard to the fact that litigation disputing the existence of the reservation remained pending. As depicted in the redrawn Census map, half of Madison County falls within the legal boundaries of the Oneida reservation, as does approximately one-third of Oneida County and a portion of Lewis County.

The sudden re-mapping provoked outcries from government leaders, and stoked public fears and uncertainty about what this reconstituted reservation means to the non-Indian residents and governing bodies within the purported reservation boundaries. Residents living within the claimed reservation area not long ago faced a lawsuit brought by the OIN, and supported by the United States, that sought ejectment of 20,000 private landowners from that area. *Sherrill*, 544 U.S. at 213. The ejectment claims—found to have been filed by the OIN in bad faith—were premised in part on the OIN's legal contention that the Oneidas' historic reservation in central New York has never been disestablished by Congress and continues to exist "intact" today. *See Oneida Indian Nation of New York v. Oneida County*, 199 F.R.D. 61, 66-68 (N.D.N.Y. 2000).

The re-drawing of long settled legal boundaries produced the following local newspaper headlines: "Oneida Nation Swallows Half of Madison County with Map Change"[18]; "2010 Census Information Identifies Northern Half of Madison County as 'Federally Recognized Oneida Indian Nation Reservation'"[19]; and "Map dumbfounds Madison County."[20] Through the efforts of Senator Charles Schumer, the Census Bureau agreed to withdraw its radically re-drawn map of central New York pending the outcome of the Counties' legal challenges to the "not disestablished" reservation.

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18. Syracuse Post Standard, Jan. 20, 2011, at A-1.

19. Martha E. Conway, Madison County Courier, Jan. 14, 2011, http://madisoncountycourier.com/?p=22230.

20. Glenn Coin, Syracuse Post-Standard, Jan. 20, 2011, at A-3.

Even so, the Department of Interior is on record supporting the re-issuance of the Census map with the OIN's undiminished historic reservation depicted if the Counties are not successful in their present appeal. For its part, the OIN adamantly maintained the valid legal status of its "intact" reservation:

> Every court that has ever considered this issue has ruled that the Oneida Nation (300,000 acre) reservation was never disestablished. Even after Senator Schumer's interference, the Department of the Interior's new letter still acknowledges that "the Oneida Reservation has not been disestablished and is intact" and that "this position is legally binding."

See Press Release from OIN, Feb. 4, 2011 (available at http://www.oneidaindiannation.com/pressroom/morenews/Nat-115283589.html) (quoting DOI letter dated February 3, 2011).[21]

The re-mapping and re-classification of 450 square miles of central New York as the Oneida Indian reservation

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21. The re-mapping decision in 2010 grew out of Census Bureau's Tribal Statistical Areas Program (TSAP) for the 2010 Census, which among other things allowed tribes to update or delineate boundaries for "American Indian Reservations" (AIR). An AIR is defined as "[a] type of legal geographic entity that is a recognized American Indian land area with a boundary established by final treaty, statute, executive order and/or court order and over which the tribal government of a federally recognized American Indian tribe has governmental authority." http://www.census.gov/geo/www/tsap2010/tsap2010_po.html; *see* http://www.census.gov/geo/www/2010census/gtc/gtc_aiannha.html#air.

casts a long shadow over central New York, carrying with it serious consequences. As set forth in its letter to the Census Bureau, OIN considers the map to have established "the legal boundary of the Oneida Nation" and OIN still contends that the so-called "reacquired" reservation land is sovereign territory of the OIN. Moreover, the federal government relies on the Census Bureau data and maps for a wide range of purposes, including allocating $400 billion in federal funds each year for public projects and federal aid benefits to state, local and tribal governments, and establishing Congressional districts. *See* U.S. Census Bureau website at http://www.census.gov/aboutus/.

The re-drawn map shows almost a million percent increase in reservation land (compared to the existing 32-acre Oneida Territory) and would add tens of thousands of non-Indian residents to the OIN's claimed reservation.

The Census Bureau has suggested that the legal boundary of the OIN's purported reservation does not give rise to an inference of tribal authority within the claimed reservation, contrary to OIN's position and the Census Bureau's own definition of an AIR. If that suggestion is true, then the Census map is further evidence of the fictional nature of the OIN's "not disestablished" reservation. If the legal boundaries do give rise to an inference of tribal authority over the "reacquired lands" (as OIN claims and the Census Bureau's AIR definition recognizes), then the Census map directly conflicts with this Court's holding in *Sherrill*.

The unintended adverse consequences of the Census Bureau officially recognizing a 300,000-acre reservation in central New York are almost limitless given the vast

array of governmental and private uses for census data. Among those relying on census data are the Bureau of Economic Analysis (to determine gross domestic product), the Federal Reserve System (to calculate flow of funds), private research organizations, businesses, public interest groups, policy makers, social scientists, academia, investment managers, media and state and local governments. *See* U.S. Census Bureau, The 2012 Census of Governments (March 4, 2012) (presented to the Finance and Intergovernmental Affairs Steering Committee National Association of Counties).

Re-drawing the official U.S. maps is just part of the OIN's strategy to aggressively assert its perceived status as a fully independent sovereign nation and exercise jurisdiction within the claimed reservation area. The OIN has arrogated to itself post-*Sherrill* regulatory power over the parcels it has purchased within its reservation area, including zoning, building codes, health services, environmental controls and police powers. OIN has argued in the state court tax assessment proceeding, and can be expected to argue elsewhere, that all the lands within the legal boundary of a not disestablished "intact" reservation are "Indian country," as the OIN expressly argued in *Sherrill* and *Madison County,* such that the federal government has jurisdiction under the Major Crimes Act, 18 U.S.C. § 1151. As this Court has noted, a "finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S. at 471 n.12.

The uncertain status of the lands, and OIN's attempts to exercise sovereignty over them, open up a "Pandora's Box" of conflict and confusion among and between the

federal, state and tribal governments. On a true, legally cognizable reservation, a tribe arguably exercises sovereign authority over "all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders…." *Merrion*, 455 U.S. at 190 (1982) (Stevens, J., dissenting); *see also Nevada v. Hicks*, 533 U.S. 353, 360, 380 (2001) (stating that an "important part of tribal sovereignty" is that tribal authority covers activities of "non-Indians on their reservations ….") (quoting *Montana v. United States*, 450 U.S. 544, 565-66 (1981)). In *Montana*, this Court articulated a balancing test to address the complex interplay of state, federal and tribal jurisdiction within checkerboarded reservations where non-Indians own and occupy lands in fee. *See generally* Cohen's Handbook of Federal Indian Law § 6.02 (2012 ed.)). That balancing test ostensibly applies to any exercise of tribal jurisdiction over non-tribal lands and non-members within a reservation, but it make no sense to apply the *Montana* test in the context of OIN's "not disestablished" reservation where the tribe cannot lawfully exercise tribal jurisdiction over any of the properties it owns in fee and the OIN owns less than 6% of its claimed "reservation" lands.

Given the jurisdictional complexities that arise in the context of physically-existing checker-boarded reservations, it is inevitable that substantial additional jurisdictional confusion and conflict will arise in connection with a "not disestablished reservation."

3. The Legal Fiction Of A "Not Disestablished" Reservation Confounds The Administration Of Federal Laws Designed To Help Indians

"Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Morton,* 417 U.S. at 552. These include Indian hiring preferences,[22] Indian Business Development programs,[23] Small Business Administration's Historically Underutilized Business Zones programs,[24] Indian Child and Family programs,[25] health programs,[26] educational programs,[27] energy programs,[28] and transportation

22. *See* 23 U.S.C. § 140(d) – Nondiscrimination – Statewide transportation planning – Indian preference. *See also* Indian Employment Credit 26 U.S.C. § 45A.

23. *See* 25 C.F.R. § 286.7 ("[E]nterprise must be located on an Indian reservation or located where it makes or will make an economic contribution to a nearby reservation . . .").

24. *See* 13 C.F.R. § 126.103 (HUBZone Program) (referring to "[l]ands within the external boundaries of an Indian reservation").

25. *See* 25 U.S.C. §§ 1931-1933.

26. *See* Indian Health Care Improvement Act, 25 U.S.C. §§ 1651-58 (addressing the health care needs of "urban Indians" who do not live on reservations); *Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243 (9th Cir. 2007); *see also* 25 U.S.C. § 1677.

27. *See* 25 U.S.C. § 2004(e) ("[S]tudents residing near the reservation").

28. *See* Federal Power Act, 16 U.S.C. § 797 and § 803 (license subject to approval of Indian tribe "having jurisdiction" of "tribal lands" under 25 U.S.C. § 476).

programs.[29] Each of these federal programs has a clear territorial component tied to a physically extant reservation. None of them addresses a "not disestablished" reservation and cannot be made to apply to that fictional legal construct without ignoring basic definitional requirements of a reservation, something both the DOI and U.S. Census Bureau have demonstrated a willingness to do in response to requests by the OIN.

Large-scale jurisdictional discord may arise in the context of federal environmental statutes that explicitly authorize EPA to "treat tribes in the same manner as states" for purpose of implementing various environmental programs. Tribal Assumption of Federal Environmental Laws available on EPA's website.[30] In order for EPA to treat a tribe in the same manner as a state the tribe must have jurisdiction over the area in question. *Id*. For example, under the implementing regulations of the Clean Air Act, EPA can transfer responsibility to the tribe only if "[t]he functions to be exercised by the Indian tribe pertain to the management and protection of air resources *within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction*." 40 C.F.R. § 49.6 (emphasis added).

While today's OIN is a federally-recognized tribe it has no tribal jurisdiction over the lands within its "not disestablished reservation" (save for possibly 32 acres) and thus has no authority for environmental protection

29. *See* 23 U.S.C. § 101 (The term "Indian reservation road" means a "public road that is located within or provides access to an Indian reservation….").

30. *See* http://www.epa.gov/tribalcompliance/airresources/arregsdrill.html#assumption.

or public health and safety regarding them. Every time a federal agency extends Indian programs and benefits to that area, notwithstanding the absence of tribal jurisdiction, conflict is bound to occur. Such actions are an affront to the state and local governments that lawfully exercise jurisdiction in the area and, by benefitting only a tiny fraction of the populace (.3% Madison County, .7% Oneida County) provoke resentment among the 99% of county residents who are not Indian.

C. The Recurring And Continuing Litigation In New York State Regarding Ancient Indian Reservations.

Other litigants and courts in New York are struggling to determine the status of historic Indian reservations in New York. *See, e.g., Cayuga Indian Nation of New York v. Seneca County*, No. 11-CV-6004, 2012 U.S. Dist. LEXIS 117245 (W.D.N.Y. August 20, 2012) ("*Cayuga II*") (Notice of Interlocutory Appeal filed on September 14, 2012); *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) ("*Cayuga I*"). Although the issue in *Cayuga I* was whether certain tribally-owned land situated on the Cayugas' historic aboriginal reservation constituted a "qualified reservation" for purposes of New York's cigarette sales tax statute, the New York Court of Appeals looked to federal law regarding whether the Cayuga reservation was disestablished or diminished and noted the absence of Supreme Court authority on this question. *Cayuga I*, 14 N.Y.3d at 640. Further, in analyzing the sales tax law's recent legislative history, the court concluded that it "would have been known to the [New York] Legislature" at the time the reservation exemption was approved (post-*Sherrill*) that "the Supreme Court

had recognized that an Indian nation might possess reservation property over which it could not exercise aspects of its traditional sovereign power." *Id.* at 644. To extent that the New York Court of Appeals accurately summarized the current state of federal Indian law—i.e., permitting recognition of an Indian reservation that lies exclusively within the jurisdiction of the state in which it is located and over which the tribe exercises no tribal sovereignty—this aspect of federal law is confusing and contradictory and should be revisited.

In *Cayuga II*, the district court addressed the same issue upon which this Court granted certiorari in 2010 in *Madison County*, namely whether tribal sovereign immunity from suit bars foreclosure when a tribe fails to pay lawfully imposed real property taxes. Like the OIN, the Cayuga Indian Nation (CIN) recently purchased various properties located within its historic reservation area from non-Indian sellers; the CIN holds the parcels in fee simple. The CIN contends that the various sales of reservation lands to New York in the 19th Century were "illegal" and "void *ab initio*" because they failed to comply with the Non-Intercourse Act. As a result, the CIN asserts that "the entire 64,000-acre Cayuga Reservation remains intact to this day." *Cayuga II*, 2012 U.S. Dist. LEXIS 117245, at *1-2 (citing Amended Compl., at ¶ 10).

The district court relied on the vacated court of appeals' 2010 decision to hold that foreclosure was barred, *see id.* at *13-20, noting that the tribe only claimed "sovereign immunity from suit as to foreclosure actions against properties within the [Cayuga] Reservation, which it maintains has never been disestablished, but not as to properties outside the Reservation." *Id.* at *18.

The status of the Cayugas' land as "reservation land" is therefore central to its sovereign immunity claim and is expected to be addressed in Seneca County's pending appeal. Accordingly, a decision from this Court clarifying the legal status of the ancient Oneida reservation in New York will provide much needed guidance to lower courts as they grapple with this recurring question.

CONCLUSION

The fact that the OIN and the Counties have such different understandings of this Court's holding in *Sherrill* and what the court of appeals' pre-*Sherrill* holding means for the subject lands in central New York, makes review by this Court necessary. There are live disputes between two governments fueled by the uncertainty and ambiguity of the fictional "not disestablished" reservation. This Court has twice agreed to address this serious question and the importance of the issue and need for review have only grown. This Court should review the court of appeals' pre-*Sherrill* "not disestablished" reservation ruling (adhered to in 2010 and 2011) and reconcile that determination with this Court's holding in *Sherrill* that the OIN exercises no sovereign authority over those lands, as well as this Court's findings as a matter of historical fact that the lands have not been treated as a reservation for generations. That review is long overdue and stands to benefit all stakeholders. This Court is in a position to make the law track historical reality and reflect common sense by declaring that the Oneida reservation was disestablished or severely diminished to 32 acres as the record in *Sherrill* unmistakably demonstrates.

The OIN's path to securing a reservation in New York is through a congressional act or, provided the tribe can meet the statutory requirements of the Indian Reorganization Act, through the land-into-trust process.

The petition for a writ of certiorari should be granted.

Date: November 12, 2012

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED OCTOBER 20, 2011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 05-6408-cv (L); 06-5168-cv (CON);
06-5515-cv (CON)

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff-Counter-Defendant-Appellee,

- v –

MADISON COUNTY AND ONEIDA
COUNTY, NEW YORK,

Defendants-Counter-Claimants-Appellants,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor-Appellant.

February 7, 2011, Final Submission on Remand
October 20, 2011, Decided

JUDGES: Before: CABRANES, SACK, and HALL, Circuit Judges.

OPINION BY: SACK

Appendix A

OPINION

SACK, Circuit Judge:

These consolidated appeals, which have been returned to us on remand from the United States Supreme Court, once again call upon us to consider whether -- and, if so, on what grounds -- the plaintiff-appellee, the Oneida Indian Nation of New York (the "OIN"), is entitled to restrain the defendants-appellants, Madison County and Oneida County (the "Counties"), from foreclosing upon certain fee-title properties, acquired on the open market by the OIN in the 1990s, for which the OIN has refused to pay property tax. In our previous opinion, *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010) ("*Oneida I*"), we concluded that the Counties were barred from foreclosing on these properties by virtue of the OIN's tribal sovereign immunity from suit. We therefore affirmed the judgments of the United States District Court for the Northern District of New York (David N. Hurd, Judge), which had issued parallel injunctions barring the Counties from enforcing their property-tax regimes against the OIN's properties through tax sale or foreclosure. *See Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 292 (N.D.N.Y. 2006) ("*Oneida County I*"); *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 231-32 (N.D.N.Y. 2005) ("*Madison County I*"). Although the district court rested its grant of judgment in each case on four independent grounds -- (1) the OIN's tribal sovereign immunity from suit; (2) federal restrictions on the alienation of tribal lands under the Nonintercourse Act, 25 U.S.C. § 177; (3) inadequate notice to the OIN of the expiration of the Counties' respective

redemption periods, in violation of due process; and (4) the exemption of "Indian reservation[s]" from property tax under New York state law, *see Oneida County I*, 432 F. Supp. 2d at 289-90; *Madison County I*, 401 F. Supp. 2d at 227-31 -- our decision on appeal affirmed the judgments solely on the basis of tribal sovereign immunity from suit. *See Oneida I*, 605 F.3d at 160.

Subsequent to our decision in *Oneida I*, the Counties successfully petitioned the United States Supreme Court for a writ of certiorari. While the case was pending before the Supreme Court, however, the OIN notified the Court that it had voluntarily waived its tribal sovereign immunity from suit. In light of that factual development, the Supreme Court vacated our judgment in *Oneida I* and remanded for further proceedings. The Court has instructed us, on remand, to "address, in the first instance, whether to revisit [our] ruling on sovereign immunity in light of this new factual development, and -- if necessary -- proceed to address other questions in the case consistent with [our] sovereign immunity ruling." *Madison County v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704, 704, 178 L. Ed. 2d 587 (2011) (per curiam).

After reviewing the parties' submissions on remand from the Supreme Court, we conclude that the district court's judgments can no longer be sustained on the basis we relied upon in *Oneida I*. The OIN has affirmatively disclaimed any reliance on the doctrine of tribal sovereign immunity from suit, and it thereby abandoned its declaratory claims against the Counties to the extent that they depended on such immunity. We further conclude that the OIN has abandoned its declaratory claims premised upon the Nonintercourse Act, 25 U.S.C. § 177.

Those dispositions leave two grounds remaining in support of the district court's judgments: the OIN's due-process claims, based upon the Counties' alleged failure to provide adequate notice to the OIN of the expiration of the redemption periods applicable to each County's respective tax-enforcement proceedings, and the OIN's claims that its properties are exempt from taxation under New York Indian Law § 6 and New York Real Property Tax Law § 454.

With respect to the due-process claims, we conclude that the district court erred in ruling that the redemption notices failed to comport with due process. We reverse the district court to the extent that it entered judgment in the OIN's favor on its claims for violations of the Fourteenth Amendment.

With respect to the OIN's claims arising under state tax law, we conclude that concerns of comity, fairness, and judicial economy warrant that we and the district court decline to exercise supplemental jurisdiction over them. We vacate the district court's judgments to the extent that they rest upon a determination that the OIN is entitled to property-tax exemptions under state law, and we remand with instructions to the district court to dismiss without prejudice the OIN's state-law claims. Because no grounds remain in support of the district court's award of permanent injunctive relief, we also vacate both injunctions in their entirety.

Finally, we affirm, in whole or in part, the district court's determinations as to several ancillary matters: First, we affirm the district court's subsidiary ruling

in the Oneida County litigation (a ruling also arguably implicit in the Madison County litigation) that the OIN is not liable to pay penalties or interest for unpaid taxes accruing prior to March 29, 2005, on the ground that the Counties have forfeited their defense on this issue. Second, as in *Oneida I*, we affirm the district court's decision to decline to abstain from this litigation. Third, we affirm the denial of a motion by the Stockbridge-Mun*see* Community, Band of Mohican Indians seeking to intervene in this litigation. Lastly, we affirm the district court's dismissal of the Counties' counterclaims seeking a declaration that the Oneida Nation's ancient reservation was disestablished.

BACKGROUND

The background facts of this protracted and procedurally convoluted litigation are set forth in various opinions of this and other Courts. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203-12, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) ("*Sherrill III*"); *Oneida I*, 605 F.3d at 152-56; *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 146-52 (2d Cir. 2003) ("*Sherrill II*"), *rev'd*, *Sherrill III*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386; *Oneida Indian Nation of N.Y. v. City of Sherrill*, 145 F. Supp. 2d 226, 232-36 (N.D.N.Y. 2001) ("*Sherrill I*"), *aff'd in part*, *vacated and remanded in part*, *Sherrill II*, 337 F.3d 139, *rev'd*, *Sherrill III*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386.[1] We

1. The short-form citations employed in this decision differ from those used in our previous decision of April 2010. For example, the 2003 Second Circuit decision that we previously referred to as "*Oneida I*" is now referred to as "*Sherrill II*."

repeat them only insofar as we think necessary to an understanding of our resolution of these appeals.

The Oneida Nation's Ancient Reservation

The OIN is a federally recognized Indian tribe that is directly descended from the original Oneida Indian Nation ("Oneida Nation"), one of six Iroquois nations.[2] *Sherrill III*, 544 U.S. at 203. The Oneida Nation's homeland once encompassed "some six million acres in what is now central New York [State]." *Id.* In 1788, pursuant to the Treaty of Fort Schuyler between the Oneida Nation and the State of New York, the Oneida Nation ceded title to the vast majority of its lands and retained a reservation of approximately 300,000 acres. *Id.* In 1790, Congress passed

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2. We have previously cautioned:

> Despite our use of the "OIN" acronym, the Oneida Indian Nation of New York should not be confused with the original Oneida Indian Nation, which is not a federally recognized tribe and is not a party to these consolidated cases. . . . [T]he original Oneida Indian Nation became divided into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Canadian Oneidas, by the middle of the nineteenth century.

Sherrill II, 337 F.3d at 144 n.1. Today, those three bands are known as the Oneida Indian Nation of New York (*i.e.*, the OIN); the Oneida Tribe of Indians of Wisconsin; and the Oneida Nation of the Thames, respectively. *See Oneida Indian Nation of N.Y. v. Madison County*, 145 F. Supp. 2d 268, 269-70 (N.D.N.Y. 2001), *rev'd*, *Sherrill II*, 337 F.3d 139, *rev'd*, *Sherrill III*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386.

the first Indian Trade and Intercourse Act, also known as the Nonintercourse Act, a law barring the alienation of tribal land absent the acquiescence of the federal government.[3] *See* Act of July 22, 1790, ch. 33, 1 Stat. 137. In 1794, the United States and various Iroquois nations, including the Oneida Nation, entered into the Treaty of Canandaigua. "That treaty both 'acknowledge[d]' the Oneida Reservation as established by the Treaty of Fort Schuyler and guaranteed the Oneidas' 'free use and enjoyment' of the reserved territory." *Sherrill III*, 544 U.S. at 204-05 (brackets in original) (quoting Act of Nov. 11, 1794, art. II, 7 Stat. 44).

Despite the provisions of the Nonintercourse Act, substantial portions of the Oneida Nation's remaining reservation lands were thereafter conveyed to New York State and private parties without federal permission. *See id.* at 205-06; *Sherrill II*, 337 F.3d at 147-48. And by the early nineteenth century, the federal government itself, in apparent disregard of its commitments under the Treaty of Canandaigua, "pursued a policy designed to open reservation lands to white settlers and to remove tribes westward." *Sherrill III*, 544 U.S. at 205.

By 1838, the Oneida Nation had sold all but 5,000 acres of its reservation. *Id.* at 206. That year, the United

3. The Nonintercourse Act remains substantially in force today. *See Sherrill III*, 544 U.S. at 204 & n.2. The statute, codified at 25 U.S.C. § 177(a), bars the "purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians . . . unless the same be made by treaty or convention entered into pursuant to the Constitution." *See also* 25 C.F.R. § 152.22(b).

States and various Indian tribes in New York, including the Oneida Nation, entered into the Treaty of Buffalo Creek, an agreement that contemplated the eventual removal of all remaining Native Americans in New York to reservation lands in Kansas.[4] *See* Act of Jan. 15, 1838, 7 Stat. 550. These efforts were not completed, however, and federal efforts to relocate the New York Oneidas to Kansas ended by 1860. *See Sherrill III*, 544 U.S. at 207. Nonetheless, by 1920, only thirty-two acres of the Oneida Nation's ancient reservation remained in tribal possession. *See id.*

In the mid-twentieth century, descendants of the Oneida Nation began seeking legal relief -- first through proceedings before the Indian Claims Commission, and later through litigation in federal court -- for the allegedly unlawful dispossession of their ancestral lands. *Id.* at 207-08. In 1970, the OIN and the Oneida Indian Tribe of Wisconsin instituted a "test case" against Oneida County and Madison County alleging that the Oneida Nation's cession of some 100,000 acres to the State of New York in 1795 had violated the federal Nonintercourse Act and therefore had not terminated the Oneidas' legal right to possess those lands. *Id.* at 208. The Oneidas subsequently received several favorable decisions from the United States Supreme Court. *See Oneida Indian Nation of N.Y. v. Oneida County*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) ("*County of Oneida I*") (upholding federal

4. As we will discuss further below, the parties vigorously dispute whether the Treaty of Buffalo Creek effected a legal disestablishment or diminishment of the Oneida Nation's ancient reservation.

jurisdiction over the Oneidas' complaint); *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*County of Oneida II*") (ruling that the Oneidas had stated a claim for damages under federal common law). In 1974, a few months after the Oneidas' success in the Supreme Court in County of *Oneida I*, the OIN initiated a more comprehensive land claim against the Counties. *See Oneida Indian Nation of N.Y. v. County of Oneida*, No. 5:74-CV-187 (N.D.N.Y. filed May 3, 1974) (the "Land Claim Litigation"). Later, the United States intervened as a plaintiff, and the State of New York was added as a defendant. That litigation, which centers on the OIN's claims to more than 250,000 acres of ancestral lands that are not currently in the OIN's possession, continues to the present day. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 119-21 (2d Cir. 2010) (surveying procedural history of the Land Claim Litigation), *cert. denied*, -- U.S. ---, 2011 WL 1933740, 132 S. Ct. 452, 181 L. Ed. 2d 308, 2011 U.S. LEXIS 7494 (U.S. Oct. 17, 2011). However, the Land Claim Litigation is not directly at issue in the present appeals. The appeals before us are only about lands that the OIN reacquired on the open market in the 1990s and now possesses.

The OIN's Land Purchases and the City of Sherrill Litigation

In the early 1990s, the OIN began to reacquire, through voluntary, free-market transactions, lands that had once been a part of the Oneida Nation's reservation, but which later passed into the possession of New York

State or private, non-Indian titleholders, who thereafter held title to them in fee simple. *See Sherrill II*, 337 F.3d at 144, 156. Before the OIN's recent reacquisition of these fee-title lands -- which are located within Madison County and Oneida County and in various cities therein, including the City of Sherrill -- the lands had been subject to property taxation.

After acquiring the lands in the 1990s, the OIN refused to pay property tax upon them. The OIN contended that these properties fell within the Oneida Nation's reservation as recognized by the Treaties of Fort Schuyler and Canandaigua and that the OIN's re-purchase of those lands had resuscitated the tribe's "sovereign dominion over the parcels." *Sherrill III*, 544 U.S. at 213. In asserting that the fee-title lands remained part of its reservation, the OIN principally relied upon the Supreme Court's 1985 decision in *County of Oneida II*, which held that the OIN was entitled to bring suit under federal common law for the wrongful alienation of its ancestral lands, *see* 470 U.S. at 253-54.

One of the taxing authorities within whose jurisdiction some of the reacquired lands fell, the City of Sherrill, responded to the OIN's refusal to pay property taxes by selling three of the OIN's properties at a tax sale. *See Sherrill I*, 145 F. Supp. 2d at 232-33. The City itself purchased the properties, and it later began formal eviction proceedings. *Id.* In response, in February 2000, the OIN brought suit against the City of Sherrill in the United States District Court for the Northern District of New York seeking a declaration that the lands in question

were "Indian country" as defined by federal law, *see* 18 U.S.C. § 1151, and were therefore exempt from state and municipal taxation. *Sherrill I*, 145 F. Supp. 2d at 237. Two weeks later, the City of Sherrill began a summary eviction proceeding in state court seeking to evict the OIN from the three parcels. The OIN removed the eviction action to federal court. *See id.* at 233, 238. At about the same time, the OIN also brought a declaratory-judgment suit against Madison County, which had initiated in rem tax-foreclosure proceedings on certain OIN-owned properties. *Id.* at 239-40. These three cases, along with a fourth lawsuit brought by the City of Sherrill against individual OIN members, were designated as related and assigned to Judge David N. Hurd. *See generally Sherrill II*, 337 F.3d at 144-45 (identifying and describing these four cases); *Sherrill I*, 145 F. Supp. 2d at 236-40 (same).

The district court, accepting the OIN's theory that the repurchased fee-title lands constituted "Indian country" within the meaning of 18 U.S.C. § 1151, granted summary judgment in the OIN's favor in all of the related lawsuits and enjoined both the City of Sherrill and Madison County from further attempts to collect property tax.[5] *See Sherrill I*, 145 F. Supp. 2d at 267-68. On appeal, we affirmed the district court's judgments in each of the

5. In a separate opinion, the district court also denied Madison County's motion to dismiss pursuant to Fed. R. Civ. P. 19 based upon the OIN's failure to join two parties: the Oneida Tribe of Indians of Wisconsin and the Oneida of the Thames. *See Oneida Indian Nation of N.Y. v. Madison County*, 145 F. Supp. 2d 268 (N.D.N.Y. 2001). We affirmed that determination on appeal. *See Sherrill II*, 337 F.3d at 169-70.

three lawsuits involving the City of Sherrill, *see Sherrill II*, 337 F.3d at 155-69, but vacated the judgment in the suit involving Madison County on procedural grounds, *see id.* at 146, 170-71. The City of Sherrill successfully petitioned the United States Supreme Court for a writ of certiorari, and the OIN's lawsuit against Madison County was held in abeyance pending the outcome of the City of Sherrill's Supreme Court appeal.

In 2005, in reviewing our decision in *Sherrill II*, the Supreme Court focused its attention on a question that it had reserved two decades before: "'whether equitable considerations should limit the relief available to the present day *Oneida I*ndians.'" *Sherrill III*, 544 U.S. at 209 (quoting County of *Oneida II*, 470 U.S. at 253 n.27). Answering that question in the affirmative, the Supreme Court held that "standards of federal Indian law and federal equity practice preclude[d] the [OIN] from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214 (internal quotation marks omitted). The Court explained:

> [T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

Id. at 221; *see also id.* at 215 n.9. The Supreme Court therefore reversed our judgment in *Sherrill II*, which had affirmed the injunctions entered in the OIN's favor. But the Court acknowledged that it had not squarely addressed all of the questions that the parties had briefed, *see Sherrill III*, 544 U.S. at 214 n.8, including whether the ancient Oneida Nation reservation had been disestablished or diminished by the 1838 Treaty of Buffalo Creek, *see id.* at 215 n.9.

The Counties' Subsequent Attempts to Foreclose on the OIN's Land

Following the Supreme Court's ruling in *Sherrill III* that the OIN did not possess "sovereign authority" over the reacquired properties, *id.*, the OIN reached a settlement with the City of Sherrill. *See Madison County I*, 401 F. Supp. 2d at 223 n.2 (noting settlement). The OIN was unable, however, to reach agreement with two other taxing authorities: Madison County and Oneida County.

Madison County. Beginning in 1999, Madison County commenced annual *in rem* tax-enforcement proceedings against parcels of land that had been repurchased by the OIN in the 1990s and on which the OIN had refused to pay taxes.[6] From 2000 onward, however -- after the filing of the Madison County litigation in the Northern District of New York -- Madison County followed a practice of

6. Madison County's tax-enforcement procedures, which are governed by Article 11 of the New York Real Property Tax Law, are described in further detail in Part III.B.1 of the Discussion section, below.

initiating such proceedings only to withdraw them without prejudice in anticipation of a resolution of the taxability question in federal court. It continued to do so until, in 2003, this Court separated the ongoing Madison County litigation from the City of Sherrill litigation and remanded the Madison County suit to the district court for further proceedings. *See Sherrill II*, 337 F.3d at 171.

On November 14, 2003, Madison County began a tax-enforcement process with respect to some ninety-eight parcels of OIN-owned property by including those parcels on a list of delinquent taxes filed with the county clerk. This time, however, Madison County did not abandon the tax-enforcement process as to the OIN-owned parcels. Instead, in December 2004, the County proceeded to execute a petition of foreclosure in New York state court. Notice of this filing was sent to the OIN by certified mail on December 8, 2004, and published in local newspapers in December 2004 and January 2005. The notice established March 31, 2005, as the last day that the properties could be redeemed from foreclosure by full payment of back taxes, plus penalties and interest. *Id.* Just two days before the final day for redemption, on March 29, 2005, the Supreme Court decided *Sherrill III*. *See* 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386. In light of this development, Madison County subsequently extended the redemption period for the OIN's properties until June 3, 2005, and later to July 14, 2005.

In the meantime, on March 30, 2005, the OIN filed a verified answer in the state-court foreclosure action. On April 28, 2005, Madison County moved for summary

judgment in the state-court action. Madison County maintains that as of May 15, 2005, the OIN owed it approximately $3 million in unpaid property taxes, penalties, and interest.

Oneida County. Similarly, in the years prior to 2005, Oneida County appears to have followed a practice of beginning, but not completing, its tax-enforcement procedures with respect to OIN-owned lands.[7] However, after the Supreme Court's decision in *Sherrill III* in March 2005, Oneida County began to implement fully its tax-enforcement procedures against OIN-owned properties. On June 3, 2005, Oneida County's Deputy Commissioner of Finance hand-delivered notices to the OIN with regard to fifty-nine parcels that had been sold at tax sale three years prior. *Oneida County I*, 432 F. Supp. 2d at 288. These notices specified that the OIN would have until July 29, 2005, to remit all unpaid taxes, penalties, and interest or else forever lose its legal interest in the properties. *Id.* Oneida County subsequently delivered additional final-redemption notices to the OIN for another sixty-two parcels on September 26, 2005, and an additional

7. Unlike Madison County, Oneida County does not follow Article 11 of the New York Real Property Tax Law; instead, it follows its own tax-enforcement procedures, which provide for a tax sale followed by transfer of title. *See Oneida County I*, 432 F. Supp. 2d at 287. These procedures are described in Part III.B.2 of the Discussion section, below.

Despite the fact that Oneida County employs a tax-sale procedure rather than simple foreclosure, we occasionally use the term "foreclosure" generically in this opinion to refer to the tax-enforcement procedures of both Madison County and Oneida.

sixty-six parcels on October 27, 2005. *Id.* Oneida County maintains that, as of November 30, 2005, the OIN owed it approximately $5 million in unpaid property taxes, penalties, and interest.

The Post-*Sherrill III* District Court Proceedings

In an effort to prevent each of the Counties from completing its respective tax-enforcement procedures, the OIN sought declaratory and injunctive relief in federal court. As to Madison County, against which litigation had been pending since March 2000, the OIN moved in June 2005 for a preliminary injunction to restrain all further efforts to foreclose upon OIN-owned property. The district court granted that motion and issued such an injunction on July 1, 2005. *See Oneida Indian Nation of N.Y. v. Madison County*, 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005) (awarding injunction).

As to Oneida County, the OIN filed suit against it for the first time in July 2005. The OIN obtained a temporary restraining order against Oneida County on October 28, 2005, barring it from further tax-enforcement efforts with respect to the OIN's property. This restraining order was then effectively converted into a preliminary injunction by stipulation of the parties. *See Oneida County I*, 432 F. Supp. 2d at 286 (describing procedural history with respect to preliminary relief).

The parties then brought cross-motions for summary judgment in each lawsuit. The district court granted the OIN's respective motions and entered judgment in its favor in each case. *See Oneida County I*, 432 F. Supp.

2d at 292; *Madison County I*, 401 F. Supp. 2d at 232-33. In concluding that the Counties could not enforce their property taxes through tax sale or foreclosure, the district court rested its determination on four independent grounds: (1) the OIN's tribal sovereign immunity from suit, *see Oneida County I*, 432 F. Supp. 2d at 289; *Madison County I*, 401 F. Supp. 2d at 228-29; (2) the Nonintercourse Act's restrictions on the alienability of tribal land, *see Oneida County I*, 432 F. Supp. 2d at 289; *Madison County I*, 401 F. Supp. 2d at 227-28; (3) the Counties' failures to give the OIN adequate notice of the expiration of the respective redemption periods in violation of principles of due process, *see Oneida County I*, 432 F. Supp. 2d at 289-90; *Madison County I*, 401 F. Supp. 2d at 230; and (4) the exemption of OIN-owned properties from property taxation as a matter of state law, *see Oneida County I*, 432 F. Supp. 2d at 290; *Madison County I*, 401 F. Supp. 2d at 231. The district court also concluded that the OIN could not be compelled to pay penalties or interest on any unpaid taxes by virtue of the OIN's tribal sovereign immunity from suit. *See Oneida Indian Nation of N.Y. v. Oneida County*, No. 6:05-CV-945, slip op. at 2-3 (N.D.N.Y. Nov. 2, 2006), ECF No. 41 ("*Oneida County II*"); *Madison County I*, 401 F. Supp. 2d at 230. Finally, the district court issued declarations in each case that the Oneida Nation had not been disestablished by the 1838 Treaty of Buffalo Creek. *See Oneida County I*, 432 F. Supp. 2d at 292; *Madison County I*, 401 F. Supp. 2d at 231, 233.

At a different point in each litigation, the district court also denied motions by the Stockbridge-Munsee Community, Band of Mohican Indians ("Stockbridge") to intervene as of right pursuant to Fed. R. Civ. P. 24(a),

based upon Stockbridge's claim to a six-square-mile reservation encompassing some of the parcels in dispute. *See Oneida Indian Nation of N.Y. v. Madison County*, 235 F.R.D. 559, 562-63 (N.D.N.Y. 2006) ("*Madison County II*"); *Oneida County I*, 432 F. Supp. 2d at 291-92.[8]

The Proceedings on Appeal to this Court: *Oneida I*

Following a round of post-judgment motion practice in each lawsuit, each County appealed from the grant of summary judgment and entry of injunctive relief against it. Stockbridge also appealed, asserting error

8. More specifically, Stockbridge asserts that fifty-two of the parcels in dispute -- two in Oneida County, and fifty in Madison County -- are part of its own undiminished reservation as recognized by the 1794 Treaty of Canandaigua. Before the district court, Stockbridge argued that the existence of its land claim made it an indispensable party to these proceedings, and that its tribal sovereign immunity from suit would, in turn, require dismissal of the lawsuit at least with respect to those parcels over which Stockbridge lays claim. The district court denied Stockbridge's motion to intervene on the basis that Stockbridge had failed to demonstrate a sufficient interest in the instant litigation. *See Oneida County I*, 432 F. Supp. 2d at 291-92; *Madison County II*, 235 F.R.D. at 562-63.

Stockbridge is seeking the adjudication of its land claim in a separate lawsuit pending in the Northern District of New York, litigation within which the OIN has appeared as a defendant-intervenor. *See* Amended Complaint, *Stockbridge-Munsee Cmty. v. New York*, No. 3:86-CV-1140 (N.D.N.Y. Aug. 5, 2004), ECF No. 228. That lawsuit was stayed pending a decision by the Supreme Court whether to grant a writ of certiorari to review our Court's decision in *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010).

in the district court's denial of its motion to intervene in the Oneida County litigation. We consolidated the three appeals. The State of New York appeared as amicus curiae in support of the Counties, while the United States, upon order of this Court, also appeared as amicus supporting the OIN.

After a brief stay and several rounds of supplementary submissions,[9] we affirmed the district court's judgments

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9. Both the stay and the supplementary submissions resulted from ongoing factual developments. These developments, which are described in our previous opinion, *see Oneida I*, 605 F.3d at 155-56, involved efforts by the OIN to have the lands at issue (amounting to roughly 17,000 acres) taken into trust by the federal government as authorized by 25 U.S.C. § 465, thereby exempting them from state or local taxation. As required by federal trust regulations, *see* 25 C.F.R. pt. 151, the OIN posted letters of credit securing the payment of all taxes, penalties, and interest determined by the courts to be lawfully due. Three years after the OIN filed its initial request, by Record of Decision issued on May 20, 2008, the Department of the Interior determined that it would take approximately 13,000 acres of the land into trust. *See* 73 Fed. Reg. 30,144 (May 23, 2008).

Thereafter, a number of entities -- including the State of New York, Madison County, Oneida County, various cities and towns, the Stockbridge tribe, and several local citizens' groups -- filed suit against the Secretary of the Interior to challenge his decision to take the OIN's lands into trust. *See, e.g., New York v. Salazar*, No. 6:08-CV-644, 2009 WL 3165591, at *1 n.2, 2009 U.S. Dist. LEXIS 90071, at *3 n.2 (N.D.N.Y. Sept. 29, 2009) (identifying related cases filed in Northern District of New York). All but one of those lawsuits remain pending, and as a result, the transfer of lands into trust has not yet been finalized. Those lawsuits do not affect our disposition of the instant appeals.

in the OIN's favor, but solely on the basis that tax sale and foreclosure of the OIN's properties were barred by the doctrine of tribal sovereign immunity from suit. *See Oneida I*, 605 F.3d at 156-60. We expressly declined to reach any of the "other three rationales relied upon by the district court" in ruling in the OIN's favor.[10] *Id.* at 160.

With respect to Stockbridge, we affirmed the denial of its motion to intervene, agreeing with the district court that it "lacked an interest in the instant litigation." *Id.* at 162; *see id.* at 161-63. We also noted that our ground for decision "render[ed] minimal the likelihood that Stockbridge w[ould] be prejudiced by its failure to be allowed to intervene." *Id.* at 163.

The Proceedings Before the Supreme Court in 2010-11

Following our decision in *Oneida I*, the Counties petitioned the United States Supreme Court for a writ of certiorari, proposing two questions for review: (1) "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes"; and (2) "whether the ancient Oneida reservation in New York was disestablished or diminished." Petition for Writ of Certiorari at i, *Madison County v. Oneida Indian Nation of N.Y.*, No. 10-72 (U.S. July 9, 2010) ("Counties'

10. One of the members of this panel filed a separate concurrence, for himself and another member of this panel, inviting Supreme Court review of our application of the doctrine of tribal sovereign immunity from suit. *See Oneida I*, 605 F.3d at 163-64 (Cabranes, J., concurring).

Cert. Petition"). The Supreme Court granted the Counties' petition, *see* 131 S. Ct. 459, 178 L. Ed. 2d 286 (2010), and ordered merits briefing.

On November 29, 2010, the OIN's tribal council convened and issued a declaration and ordinance waiving "[the OIN's] sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States."[11] Oneida Indian Nation of N.Y., Declaration of Irrevocable Waiver of Immunity, Ordinance No. O-10-1

11. The declaration reads as follows:

> TO OUR BROTHERS, on 2 December 1794, here at our homelands of the Oneida Nation, a Treaty was entered into with the United States of America which reflected the unique and special relationship between our governments . . . ; and
>
> BROTHERS, just one month before, on 11 November 1794, the United States made the Treaty of Canandaigua, . . . confirming, among other things, the ongoing government-to-government relationship between the United States and the Nation; and
>
> BROTHERS, the Nation chooses to preserve its sovereignty and also its rights acknowledged by the United States in its treaty relationship with the Nation, and also wishes to promote a peaceful and harmonious relationship with its neighbors today and unto the Seventh Generation; and
>
> BROTHERS, that peaceful and harmonious relationship would be served by removing any controversy or doubt as to the Nation's ongoing commitment to resolve disputes.

(Nov. 29, 2010) (the "Waiver Declaration"). The next day, the OIN sent a letter notifying the Supreme Court that the OIN had waived its immunity with respect to "the pending tax foreclosure proceedings directly at issue in this case and to all future tax foreclosure proceedings involving the [OIN]'s land." Letter from Seth P. Waxman, Esq., to Hon. William K. Suter, Clerk of the Supreme Court of the United States, at 1, *Madison County v. Oneida Indian Nation of N.Y.*, No. 10-72 (U.S. Nov. 30, 2010). The OIN suggested that in light of this development, "the Court may wish to direct the parties to address how this matter should proceed." *Id.*

The Counties responded by letter dated December 1, 2010. Emphasizing that the OIN's Waiver Declaration occurred just four days before the submission deadline for their opening merits brief, the Counties asserted that the OIN's waiver "appear[ed] to be a classic example of a

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> NOW, THEREFORE, PURSUANT TO THE AUTHORITY VESTED IN THE NATION BY VIRTUE OF ITS SOVEREIGNTY AND INHERENT POWERS OF SELF GOVERNMENT,
>
> The Nation hereby waives, irrevocably and perpetually, its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States. The Nation does not waive any other rights, challenges or defenses it has with respect to its liability for, or the lawful amount of, real property taxes.
>
> ENACTED THIS 29th DAY OF NOVEMBER, 2010.

litigant 'attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review.'" Letter from David M. Schraver, Esq., to Hon. William K. Suter, Clerk of the Supreme Court of the United States, at 1, *Madison County v. Oneida Indian Nation of N.Y.*, No. 10-72 (U.S. Dec. 1, 2010) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000)). The Counties also questioned the scope and permanence of the Waiver Declaration, arguing that the OIN's waiver was susceptible both of being read narrowly and of being revoked by a future tribal council. The Counties therefore argued that the waiver had not caused the question of tribal sovereign immunity from suit to become moot. *See id.* at 2-4.

The OIN replied the next day. *See* Letter from Seth P. Waxman, Esq., to Hon. William K. Suter, Clerk of the Supreme Court of the United States, *Madison County v. Oneida Indian Nation of N.Y.*, No. 10-72 (U.S. Dec. 2, 2010) ("OIN December 2 Letter"). The OIN conceded that the timing of its waiver "at this stage of the litigation [was] unusual," *id.* at 1, but argued that the waiver had not been intended to frustrate the Court's jurisdiction. Instead, the OIN characterized its Waiver Declaration as a "good-faith effort[]" to address the Counties' concerns about the sufficiency of certain letters of credit that the OIN had posted as part of the federal land-into-trust process.[12] *Id.* at 2. The Waiver Declaration, according to the OIN, was "intended to remove any doubt" surrounding the letters of credit by providing the Counties with

12. *See* supra note 9.

"the necessary assurances that any amounts [of taxes, penalties, and interest] due will be paid once they are judicially determined." *Id.* at 1-2. The OIN also responded to the Counties' concerns about the scope and permanence of the Waiver Declaration by representing that the waiver covered all taxes, penalties, and interest that were "lawfully due" and that the waiver was "irrevocable and perpetual." *Id.* at 2 (brackets and internal quotation marks omitted). Finally, the OIN posited that its waiver had "removed [the issue of sovereign immunity from suit] from the case," *id.* at 3, and suggested that the Court "direct submissions from the parties to address whether the decision below [*i.e.*, *Oneida I*] should be vacated with instructions to address the other grounds for the injunctions," *id.* at 4.

A final letter from the Counties followed later the same day. *See* Letter from David M. Schraver, Esq., to Hon. William K. Suter, Clerk of the Supreme Court of the United States, *Madison County v. Oneida Indian Nation of N.Y.*, No. 10-72 (U.S. Dec. 2, 2010). The Counties expressed their "strong[] disagree[ment]" with the OIN's view that its Waiver Declaration had caused the issue of tribal sovereign immunity from suit to become moot. *Id.* at 1. The Counties agreed with the OIN, however, that "the Court should direct them to file separate submissions addressing the impact, if any," of the OIN's Waiver Declaration. *Id.* Despite this flurry of letters, the Counties proceeded to file their opening merits brief the next day.

The Supreme Court did not direct further submissions from the parties about the effect of the Waiver Declaration. Instead, on January 10, 2011, the Supreme Court issued a

brief per curiam order referencing and briefly describing the parties' letter submissions of late November and early December 2010. *See Madison County,* 131 S. Ct. at 704. The Court did not identify or address the parties' arguments concerning whether the issue of tribal sovereign immunity from suit had become moot. Instead, the Court stated:

> We vacate the judgment and remand the case to the United States Court of Appeals for the Second Circuit. That court should address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and -- if necessary -- proceed to address other questions in the case consistent with its sovereign immunity ruling.

Id.

Proceedings on Remand

On remand, we directed the parties to provide us with supplemental letter-briefing. The OIN; the Counties; the putative intervenor, Stockbridge; and the State of New York (as amicus curiae) have each made such submissions.

DISCUSSION

I. Standard of Review

"We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party and drawing

all reasonable inferences in its favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). "Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *10 Ellicott Square Court Corp. v. Mt. Valley Indem. Co.*, 634 F.3d 112, 119 (2d Cir. 2011) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 56(a).

II. The OIN's Claims Based Upon Tribal Sovereign Immunity From Suit and the Nonintercourse Act

Our decision in *Oneida I* affirming the district court's judgments rested solely on our determination that the OIN possessed tribal sovereign immunity from suit. *See Oneida I*, 605 F.3d at 160. Since that decision, the OIN has professed to "waive[], irrevocably and perpetually, its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States." Waiver Declaration.

In its letter-brief to this Court on remand from the Supreme Court, the OIN represents that its waiver of immunity was "duly enacted" by the OIN's tribal council; that the waiver is "expressly perpetual and irrevocable," meaning that it is "not subject to invalidation" by a future tribal council; and that the waiver "covers all taxes, interest, and penalties held to be lawfully due" to the Counties. OIN's Ltr.-Br. at 4. The OIN has also indicated that it "'consider[s] itself judicially estopped from raising sovereign immunity as a defense to foreclosure actions to

enforce state, county, or local real property taxes.'" *Id.* (brackets in original) (quoting OIN December 2 Letter at 3). Finally, the OIN has "invite[d] the entry of an order reflecting the irrevocability" of its waiver. OIN December 2 Letter at 3.

In response, the Counties argue that tribal sovereign immunity from suit is still a live issue, inasmuch as the parties continue to disagree about whether the OIN ever possessed, in the first instance, any entitlement to immunity that it could subsequently waive. They also contend that the OIN has not sufficiently disclaimed its authority to re-assert its tribal sovereign immunity from suit in the future. They argue, citing *United States v. Government of Virgin Islands*, 363 F.3d 276, 45 V.I. 764 (3d Cir. 2004), that the "OIN has 'not chang[ed] its substantive stance'" on the question of whether it possesses immunity, but instead has only ceded the argument for the "'purely practical reason[]'" of avoiding Supreme Court review. Counties' Ltr.-Br. at 3 (first brackets in original) (quoting *Virgin Islands*, 363 F.3d at 286). The Counties therefore urge us to revisit our immunity analysis from *Oneida I* and conclude, in light of the Supreme Court's intervening grant of a writ of certiorari, that our prior reasoning must have been incorrect. In the alternative, they ask that we declare that the OIN's waiver has forever barred it from asserting the defense of tribal sovereign immunity from suit in "*in rem* foreclosure proceedings and all related tax collection proceedings." *Id.* at 6 (emphasis in original).

There may well be, as the Counties urge, remaining disagreements as to whether the OIN possessed tribal

sovereign immunity from suit at the time that these cases were before the district court and then on appeal to us in the first instance. But these questions have now become academic. The OIN, which had prevailed on the issue of tribal sovereign immunity from suit before both the district court and this Court, now assures us, as it did the Supreme Court, that it will no longer invoke the doctrine of tribal sovereign immunity from suit as a basis for preventing the Counties from enforcing property taxes through tax sale or foreclosure. *See* Waiver Declaration. The OIN has thus effectively announced that it has abandoned its argument that it possesses tribal sovereign immunity from suit and, therefore, has indicated that it is no longer seeking declaratory and injunctive relief against the Counties on that basis.

Under the circumstances presented here, we accept the OIN's abandonment of its immunity-based claims. Contrary to the Counties' arguments that the Waiver Declaration may not be sufficiently binding, we understand the waiver to be complete, unequivocal, and irrevocable. Neither do we have any reason to think that the OIN is using its waiver as a tactic to overturn an existing unfavorable decision. To the contrary, our decision in *Oneida I* was in its favor.

Moreover, the Counties' concern that the OIN might attempt to revoke its Waiver Declaration is unfounded. The OIN is bound by the doctrine of judicial estoppel. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds

in maintaining that position, he may not thereafter . . . assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." (brackets and internal quotation marks omitted)). As the OIN itself has stated:

> [E]ven if the Nation's "irrevocabl[e] and perpetual[]" waiver were not sufficient to protect the Counties' rights, the doctrine of judicial estoppel would be. . . . [T]he Nation considers itself judicially estopped from raising sovereign immunity as a defense to foreclosure actions to enforce state, county, or local real property taxes; invites the entry of an order reflecting the irrevocability of its declaration and ordinance; and expressly disclaims any intention ever to revoke its waiver.

OIN December 2 Letter at 2-3 (citations and footnote omitted). We take the OIN at its word, and we expect that future courts will as well. Accordingly, the OIN's immunity-based claims are no longer before this Court.

We similarly regard the OIN's claims based upon the Nonintercourse Act as having been abandoned on appeal. In its letter-brief, the OIN declares that "[i]n light of [its] representation [that it has waived its tribal sovereign immunity from suit], the Nation no longer invokes the Nonintercourse Act's statutory restrictions on the alienation of Indian land as a defense to tax foreclosures." OIN's Ltr.-Br. at 10. We take the OIN's statement that it "no longer invokes" the Nonintercourse

Act as an indication that the OIN has abandoned its claims premised on that statute. As a result, the district court's judgments in the OIN's favor may no longer be sustained on the ground that foreclosure would violate the anti-alienation provisions of the Nonintercourse Act. We therefore need not consider the merits of the Counties' and the State's arguments that the Nonintercourse Act does not bar property-tax enforcement through tax sale or foreclosure.

The decision whether to vacate the judgment of the district court in cases where a claim has been abandoned or has become moot on appeal is a discretionary one and "depends on the equities of the case." *Russman v. Bd. of Educ.*, 260 F.3d 114, 121 (2d Cir. 2001). But *vacatur* is common where it is the "unilateral action of the party who prevailed below" that causes a judgment to become unreviewable. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994); *accord Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 172 (2d Cir. 2002); *Russman*, 260 F.3d at 121-22. It has been said that the winning party in the district court should not be able to prevent appellate review of a perhaps-erroneous decision by attempting to render the district court's judgment unappealable. *See Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991). In other words, the party aggrieved by a district-court judgment should not be required to "suffer the adverse *res judicata* effects" of that judgment if the appeal was terminated through no fault of his or her own. *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994); *see also Van Wie v. Pataki*, 267

F.3d 109, 115 (2d Cir. 2001); *Mfrs. Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993).

Here, the OIN has voluntarily abandoned its claims based upon the doctrine of tribal sovereign immunity from suit and the Nonintercourse Act. It would therefore be prejudicial to the Counties to leave the district court's judgments in place insofar as they rested upon these grounds. Accordingly, we conclude that the proper course in this instance is to vacate so much of the district court's judgments as rests upon the doctrine of tribal sovereign immunity from suit and the Nonintercourse Act. *See, e.g., Arave v. Hoffman*, 552 U.S. 117, 118, 128 S. Ct. 749, 169 L. Ed. 2d 580 (2008) (partially vacating judgment after habeas-corpus petitioner, who prevailed before court of appeals, abandoned his ineffective-assistance claim after Supreme Court granted writ of certiorari); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003) (partially vacating judgment after plaintiff, who prevailed before court of appeals, abandoned one of its claims); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (vacating district court judgment in plaintiff's favor where plaintiff had resigned her public-sector employment, out of which her claims arose, while case was pending before court of appeals); *see also* 13C Charles Alan Wright *et al.*, Federal Practice & Procedure § 3533.10.1, at 578-79 (3d ed. 2008). We also conclude that under these circumstances -- because the OIN assures the world at large and us in particular that its Waiver Declaration is irrevocable and subject to the doctrine of judicial estoppel -- those claims

must be dismissed with prejudice. *See Arave*, 552 U.S. at 118-19; *Deakins v. Monaghan*, 484 U.S. 193, 200-01, 108 S. Ct. 523, 98 L. Ed. 2d 529 (1988). And we also direct the district court, on remand, to include in its amended judgment in each lawsuit that the OIN's waiver of its tribal sovereign immunity from suit is "irrevocable" and subject to the doctrine of judicial estoppel.

III. Due Process

Having determined that the OIN abandoned two of its claims for relief, we proceed to consider the third rationale supporting the district court's judgments: that the Counties' notices to the OIN of the expiration of its right of redemption failed to comport with federal due-process requirements.[13]

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13. In its several complaints, the OIN alleged that each County's foreclosure procedures violated both federal and state constitutional due-process standards. In granting summary judgment to the OIN on its due-process claims, the district court did not state whether its rulings rested upon the Fourteenth Amendment to the U.S. Constitution, or Article I, section 6 of the New York Constitution, or both. *See Oneida County I*, 432 F. Supp. 2d at 289-90 (referencing only "the [OIN's] right to due process"); *Madison County I*, 401 F. Supp. 2d at 230-31 (same). But the district court relied principally on *McCann v. Scaduto*, 71 N.Y.2d 164, 519 N.E.2d 309, 524 N.Y.S.2d 398 (1987), a decision in which the New York Court of Appeals held that Nassau County's tax-enforcement procedures "violated the Federal constitutional guarantee of due process of law." *Id.* at 170 (emphasis added); *see also id.* at 179 (Simons, J., dissenting). And in the summary-judgment proceedings in the district court, the OIN appeared to frame its due-process argument primarily in terms of federal

Appendix A

A. Governing Law

Our analysis of procedural-due-process claims ordinarily proceeds in two steps. First, we ask "whether there exists a . . . property interest of which a person has been deprived." *Swarthout v. Cooke*, 131 S. Ct. 859, 861, 178 L. Ed. 2d 732 (2011). If so, we then "ask whether the

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constitutional standards. It has not relied upon its state-law claims on appeal.

With some exceptions, New York courts have interpreted the due-process guarantees of the New York Constitution and the United States Constitution to be coextensive -- or assumed that they are. *See, e.g., Economico v. Village of Pelham*, 50 N.Y.2d 120, 124-25, 405 N.E.2d 694, 428 N.Y.S.2d 213 (1980) (appearing to treat state and federal constitutional standards as coextensive for purpose of resolving procedural due process claim), *abrogated on other grounds by Prue v. Hunt*, 78 N.Y.2d 364, 366, 581 N.E.2d 1052, 575 N.Y.S.2d 806 (1991); *Cent. Sav. Bank v. City of New York*, 280 N.Y. 9, 19 N.E.2d 659 (1939) (per curiam); *People ex rel. Newcomb v. Metz*, 64 A.D.2d 219, 222, 409 N.Y.S.2d 554, 556 (3d Dep't 1978). But *see Hernandez v. Robles*, 7 N.Y.3d 338, 362, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006) (R.S. Smith, J., plurality opinion) (citing cases involving criminal defendants or prisoners in which the Court of Appeals has interpreted the state due-process clause to provide greater protections than its federal analogue).

We need not decide, however, whether Article I, section 6 of the New York Constitution provides any greater relief than does the Fourteenth Amendment to the United States Constitution, inasmuch as the OIN has not asserted that it is entitled to any greater due-process protection under state constitutional law than under federal constitutional law. The argument, irrespective of its plausibility, is therefore forfeited on appeal. *See, e.g., City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011).

procedures followed by the State were constitutionally sufficient." *Id.*; *accord, e.g., Adams v. Suozzi*, 517 F.3d 124, 127 (2d Cir. 2008).

Property interests "are not created by the Constitution," but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *accord O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005). The Counties do not appear to dispute that the OIN possesses a cognizable property interest under New York law in the right to redeem its property from foreclosure. *See Matter of Foreclosure of Liens*, 24 Misc. 3d 204, 875 N.Y.S.2d 754, 760 (N.Y. Sup. Ct. 2009) ("Notice of a right to redeem one's property from the municipality into which title vests following a tax lien foreclosure sale enjoys constitutional procedural due process protection."); *cf. In re Pontes*, 310 F. Supp. 2d 447, 454 n.8 (D.R.I. 2004) ("The right of redemption is a property interest distinct and separate [under Rhode Island law] from an owner's right of ownership in the underlying property itself."). But *cf. Weigner v. City of New York*, 852 F.2d 646, 652 (2d Cir. 1988) (stating that once a government sends personal notice that a "foreclosure action had been initiated," it is "not required to send additional notices as each step in the foreclosure proceeding [is] completed or when each of the available remedies [is] about to lapse"), *cert. denied*, 488 U.S. 1005, 109 S. Ct. 785, 102 L. Ed. 2d 777 (1989). We assume, for the purpose of resolving these appeals, that the OIN has a constitutionally protected property interest in its right to redemption from foreclosure.

Appendix A

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deprive any person of . . . property[] without due process of law." U.S. Const. amend. XIV, § 1. "Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" *Jones v. Flowers*, 547 U.S. 220, 223, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

The OIN's claims center on the requirement of notice. It is axiomatic that where notice is legally required, the Due Process Clause of the Fourteenth Amendment requires notice that is "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314). Notice must be of "such nature as reasonably to convey the required information," *Mullane*, 339 U.S. at 314, and "[t]he means employed must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it," *id.* at 315. The notice provided also "must afford a reasonable time for those interested to make their appearance." *Id.* at 314 (citing *Roller v. Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520 (1900)). In assessing the adequacy of a particular form of notice, we must "balanc[e] the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Jones*, 547 U.S. at 229 (quoting *Mullane*, 339 U.S. at 314). But "[i]n the

context of a wide variety of proceedings[,] . . . the Supreme Court has consistently held that mailed notice satisfies the requirements of due process." *Grievance Comm. for S. Dist. of N.Y. v. Polur*, 67 F.3d 3, 6 (2d Cir. 1995) (ellipsis in original; internal quotation marks omitted), *cert. denied*, 517 U.S. 1196, 116 S. Ct. 1692, 134 L. Ed. 2d 792 (1996); *see also Mullane*, 339 U.S. at 313 ("Personal service of written notice . . . is the classic form of notice [that is] always adequate in any type of proceeding.").

We have observed that the Fourteenth Amendment "requires as much notice as is practicable to inform a [property owner] of legal proceedings against his property," *Brody v. Vill. of Port Chester*, 434 F.3d 121, 130 (2d Cir. 2005) (citing *Mullane*, 339 U.S. at 315), and that "a property owner must be given notice of foreclosure proceedings before foreclosure can occur," *Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004); *accord Jones*, 547 U.S. at 234. But due process requires only that a state take steps reasonably calculated to provide actual notice,[14] not

14. The lexicon employed in this context can be confusing. The term "actual notice" is sometimes used to refer to personal notice sent by mail, as opposed to constructive notice by publication. *See, e.g., Weigner*, 852 F.2d at 651 n.6; *McCann*, 71 N.Y.2d at 174. Other times, "actual notice" is used to signify the successful receipt of notice by its intended recipient, as opposed to the act of its sending. *See, e.g., Dusenbery v. United States*, 534 U.S. 161, 170 n.5, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002); *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995). In this opinion, we use the term "actual notice" to denote the successful receipt of notice, and the term "personal notice" to denote the sending of notice by mail to the record owner. *Cf.* N.Y. Real Prop. Tax Law § 1125 (referring to mailed notice as "personal notice").

that the notice actually reach the recipient. "Due process does not require that a property owner receive actual notice before the government may take his property." *Jones*, 547 U.S. at 226; *accord Miner v. Clinton County*, 541 F.3d 464, 471 (2d Cir. 2008), *cert. denied*, 556 U.S. 1128, 129 S. Ct. 1625, 173 L. Ed. 2d 996 (2009).

However, although due process does not require actual notice, actual notice satisfies due process -- so long as that notice "apprises [a party] of the pendency of the action and affords [it] an opportunity to respond." *Baker*, 72 F.3d at 254. Indeed, state and federal courts have frequently decided, in cases where a plaintiff received actual notice, that the Due Process Clause was not offended even though the defendant had failed to fulfill all technical notice requirements imposed by statute or rule. *See, e.g., United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378, 176 L. Ed. 2d 158 (2010); *In re Medaglia*, 52 F.3d 451, 455 (2d Cir. 1995); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 482 (2d Cir. 1992); *Sendel v. Diskin*, 277 A.D.2d 757, 759, 716 N.Y.S.2d 471, 473 (3d Dep't 2000); *Pompe v. City of Yonkers*, 179 A.D.2d 628, 629-30, 578 N.Y.S.2d 585, 587 (2d Dep't 1992).

B. The Counties' Procedures

The Counties employ different statutory procedures for property-tax enforcement.

1. Madison County. Madison County employs the default tax-enforcement procedure established by Article 11 of the New York Real Property Tax Law (the "RPTL").

The RPTL provides for a two-year, pre-foreclosure redemption period.[15] The redemption period starts to run on the "lien date," which is the date on which unpaid taxes and other assessments automatically become a lien against the property. *Id.* §§ 902, 1102(4). If taxes are not paid within the first month after the lien date, interest and penalties begin to accrue. *Id.* §§ 924, 924-a, 936(2). Ten months after the lien date, a list of delinquent taxes is prepared and filed with the county clerk. *Id.* § 1122. Twenty-one months after the lien date (*i.e.*, three months before the end of the redemption period), the enforcing authority executes a petition of foreclosure. *Id.* § 1123(1)-(2). The filing of this petition is accompanied by published notice, *id.* § 1124(1), as well as personal notice by certified and regular first-class mail to the property owner, *id.* § 1125(1). These notices must include the last date on which the properties may be redeemed. *Id.* § 1125(2). Although personalized tax statements are mailed annually to all property owners, *see id.* § 922, the only personal notice sent to owners which specifically identifies the expiration of the redemption period is the notice sent twenty-one months after the lien date pursuant to RPTL § 1125. *See generally Kennedy v. Mossafa*, 100 N.Y.2d 1, 6-8, 789 N.E.2d 607, 759 N.Y.S.2d 429 (2003) (describing the RPTL tax-foreclosure procedures).

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15. Specifically, RPTL § 1110(1) provides that "[r]eal property subject to a delinquent tax lien may be redeemed by payment to the enforcing officer, on or before the expiration of the redemption period, of the amount of the delinquent tax lien or liens, including all charges authorized by law."

In early December 2004, Madison County executed a petition of foreclosure in state court with respect to some ninety-eight parcels of OIN-owned property to enforce overdue taxes owed since the lien date of January 1, 2003. The County mailed personal notice to the OIN on December 8, 2004, and the OIN has not disputed receipt. According to that notice, the specified last day for redemption of the ninety-eight parcels was March 31, 2005. After the Supreme Court issued its decision in *Sherrill III* on March 29, 2005, Madison County unilaterally extended the OIN's redemption deadline to June 3, 2005, and later to July 14, 2005, providing notice of the extensions to the OIN in each instance. The OIN successfully obtained a preliminary injunction from the district court on July 1, 2005, preventing Madison County from undertaking further tax-enforcement efforts.

2. Oneida County. Unlike Madison County, Oneida County has opted out of the RPTL procedures. *See, e.g.*, RPTL § 1104(2) (creating opt-out mechanism). Instead, it employs its own two-step process: first, a tax sale of the property, and second, administrative transfer of title or judicial foreclosure, at the tax-sale purchaser's option. *See* 1902 Laws of N.Y. ch. 559, §§ 1 to 16, amended by 1918 Laws of N.Y. ch. 474, 1920 Laws of N.Y. ch. 111, 1922 Laws of N.Y. ch. 200, 1937 Laws of N.Y. ch. 800, 1943 Laws of N.Y. ch. 712, and 1944 Laws of N.Y. ch. 342 (*collectively*, "Oneida County Tax Law"); *see also* Aff. of Daniel Yerdon, Deputy Comm'r of Fin., Oneida County, *Oneida County II*, No. 6:05-CV-945 (N.D.N.Y. Jan. 6, 2006), ECF Doc. 23, attach. 40 ("Yerdon Aff."). Taxes come due each year on January 1, but may be paid without penalty or interest

through January 31. *See* Yerdon Aff. ¶ 4. In February of each year, a tax-delinquency notice is sent to the record owner of each delinquent parcel.[16] *Id.* ¶ 5. On the last business day of December, a tax auction is held at which the County sells all properties for which taxes have been delinquent for six months or more. *See* Oneida County Tax Law §§ 5-6; Yerdon Aff. ¶ 8. Since 1973, however, the County has had the authority to purchase delinquent properties without first offering them to public bidders. With respect to each of the 187 OIN-owned parcels at issue in this litigation, Oneida County exercised its option to purchase the properties without a public sale.

Following the tax sale, a post-sale redemption period begins.[17] *See* Oneida County Tax Law § 8; Yerdon Aff. ¶¶ 11, 15-17. The redemption period, as it has come to be applied, lasts for three years and thirty days.[18] *See*

16. This delinquency notice is not formally required by the Oneida County Tax Law, but is sent as a matter of standard administrative practice in order to align the County's practices with RPTL § 987. *See* Yerdon Aff. ¶ 5.

17. The Oneida County Tax Law provides, in pertinent part and as amended, that "[t]he owner, occupant, or any other person may redeem any real estate sold for taxes . . . at any time within one year after the last day of such sale, by paying to the country treasurer . . . the sum of one dollar plus the sum mentioned in his certificate of sale together with the interest thereon." Oneida County Tax Law § 8; *see also* Yerdon Aff. ¶ 11.

18. The statute itself provides for only a one-year redemption period. *See* Oneida County Tax Law § 8. However, "[d]espite the expiration of the one-year redemption period, the County does not recognize this event as being the final foreclosure of the right of

Yerdon Aff. ¶¶ 15-18. The Oneida County Tax Law dictates that notice of the expiration of the redemption period is to be published "within the three months immediately preceding the expiration." Oneida County Tax Law § 9; *see also* Yerdon Aff. ¶¶ 12-14. However, as a matter of standard administrative practice,[19] Oneida County also sends by certified mail a "Final Notice Before Redemption" to the record owner thirty days prior to expiration. *See* Yerdon Aff. ¶ 18. The Final Notice Before Redemption advises the owner that the property was sold at tax sale and provides the final date on which the property can be redeemed. *See id.* According to the County, the foregoing process was followed with respect to all 187 parcels of OIN-owned property at issue.[20] *See id.* ¶¶ 19-21.

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redemption and, instead, gives the property owner an additional two-year redemption period." Yerdon Aff. ¶ 15. At the end of this three-year period, the County sends the Final Notice Before Redemption, and then affords the owner an additional thirty days to redeem the property. *Id.* ¶¶ 16-18.

19. The statute provides that, aside from constructive notice by publication, "[n]o other further or different notice of the expiration of the time to redeem shall be required to be published, served upon or given to any person whatsoever." Oneida County Tax Law § 9.

20. The Final Notices for these 187 parcels were served on the OIN in three batches. First, on June 3, 2005, the County delivered notices to the OIN with regard to 59 parcels, with a redemption expiration date of July 29, 2005. Second, on September 26, 2005, the County delivered notices for 62 parcels with a redemption expiration date of October 29, 2005. Finally, on October 27, 2005, the County delivered notices for a final 66 parcels, whose redemption expiration dates are not in the record.

C. Analysis

The district court concluded that each County's redemption notices failed to comport with due process. We conclude to the contrary that both Counties are entitled to summary judgment on the OIN's due-process claims.

In explaining our conclusion, it may be useful to begin by noting what is not at issue. First, the OIN does not contest that each County sent to it personal notice by mail of the expiration of the respective redemption periods. Second, the OIN does not deny that it actually received these notices, a fact that distinguishes this litigation from the much more common due-process challenge in which a plaintiff contests the sufficiency of a notice that failed to reach its intended recipient. *See, e.g., Jones*, 547 U.S. at 225; *Miner*, 541 F.3d at 471-73; *Akey*, 375 F.3d at 235-37. Third, the OIN does not dispute the Counties' assertions that they complied with their respective statutory and administrative requirements for notifying owners of the final date for redemption, including sending personal notice at least three months in advance of expiration (as to Madison County) and at least thirty days in advance of

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As to the 59 parcels identified in the first batch of Final Notices, the OIN and Oneida County reached agreement on August 1, 2005 to extend the redemption period indefinitely for those parcels, pending the resolution of this litigation. In exchange, the OIN made a nonrefundable payment to Oneida County of $650,000 as an advance payment of any back taxes later held to be lawfully due.

expiration (as to Oneida County).[21] The OIN's argument, therefore, is not that it failed to receive actual notice of the expiration of the redemption periods at the time mandated by each County's tax enforcement procedures, but that the notices provided pursuant to these procedures were not given sufficiently in advance of the respective expiration dates to satisfy federal due-process standards.

As the basis for the proposition that the Counties' notices were constitutionally insufficient, the OIN and the district court each have relied principally on McCann. There, the New York Court of Appeals struck down the tax-enforcement procedures of Nassau County, New York, as inconsistent with the Due Process Clause of the Fourteenth Amendment. *See McCann*, 71 N.Y.2d at 177-78. The Nassau County statute provided for a two-step scheme somewhat similar to Oneida County's: first, the sale of a tax lien upon the property, followed by a two-year post-sale redemption period; and second, the transfer of title to the purchaser of the tax lien following the expiration of that redemption period. *See Oneida County I*, 432 F. Supp. 2d at 290 (observing that Oneida County's procedures are "strikingly similar" to those at issue in McCann). Crucially, however, Nassau County did not provide any personal notice to the owner prior to the tax lien sale. It required only that notice of the tax lien

21. Indeed, Madison County gave notice of the end of the redemption period approximately four months in advance of the original deadline, longer than the three-month period contemplated by RPTL § 1125. And Oneida County gave such notice approximately six weeks in advance of expiration, longer than the thirty-day period that the County normally provides.

sale be "published three times in a newspaper of general circulation." *McCann*, 71 N.Y.2d at 170. The Court of Appeals, relying on *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983), concluded that Nassau County's "failure to provide [property owners] with actual notice of the tax lien sales . . . deprived them of due process of law," *id.* at 172, because the tax-lien sale itself constituted an event that "substantially affected" the owner's property interest, *id.* at 176; *see also*, *e.g.*, *id.* (describing the tax-lien sale as "the event that moves the Sword of Damocles directly over the head of a property owner"). The Court of Appeals thereby overruled one of its previous decisions, *Botens v. Aronauer*, 32 N.Y.2d 243, 298 N.E.2d 73, 344 N.Y.S.2d 892 (1973), *appeal dismissed*, 414 U.S. 1059, 94 S. Ct. 562, 38 L. Ed. 2d 464 (1973), which had held that due-process standards did not require that personal notice of tax-sale proceedings be sent to a property owner, so long as constructive notice by publication was given. *See McCann*, 71 N.Y.2d at 176.

In the course of its decision in *McCann*, the Court of Appeals also considered Nassau County's argument that its statute was constitutional because, even though the statute did not require personal notice of the tax-lien sale, it did at least provide for personal notice of the expiration of the two-year post-sale redemption period. *See id.* at 177. Rejecting that argument, the Court of Appeals observed that the statute required such notice only at the point at which three months in the redemption period remained, *id.* at 177-78, which the court concluded was too late in the overall tax-enforcement process to

provide the owner with timely notice of the proceedings. In that connection, the Court of Appeals also took note of an apparent tension between the fact that the statute created a two-year statutory redemption period, but only provided three months' advance notice of its expiration. *Id.* It reasoned that the statute's failure to provide for notice of the tax lien sale at the first stage of the process also effectively frustrated the "legislative intention" that owners be afforded two years in which to redeem their properties.[22] *Id.*

The OIN, latching onto these final steps of the Court of Appeals' analysis, broadly construes *McCann* as dictating that the Due Process Clause requires that written notice of the date of expiration of a statutory redemption period always be given at the beginning of that period. It argues that *McCann* "held that it offends due process principles for taxing jurisdictions to truncate statutory redemption periods by serving notice of redemption rights and deadlines that are much shorter than the redemption period." OIN Br. at 27; *see also id.* at 95 ("McCann's holding as to taxation is that, when the Legislature establishes a redemption period of specified duration, due process requires that notice of redemption rights be sent to taxpayers at the outset of that period."). The

22. The Court of Appeals also stated that "[t]he truncated three-month period would in any event be troubling," in light of the substantial amount of interest and penalties that would have accrued in the twenty-one months since the tax sale. *McCann*, 71 N.Y.2d at 178. But it did not explicitly hold that three months was too short a time to "produce the funds necessary to avoid forfeiture of the title." *Id.*

district court, accepting the OIN's reading of *McCann*, concluded that, in each of the OIN's lawsuits against the City of Sherrill, Madison County, and Oneida County, the defendants' failures to send notice to the OIN of the date of expiration of the redemption period "at the beginning of the redemption period[] violate[d] the [OIN's] right to due process." *Oneida County I*, 432 F. Supp. 2d at 290; *accord Madison County I*, 401 F. Supp. 2d at 230 (concluding that because the RPTL provides a two-year redemption period, "in order to comport with due process [Madison] County must have given the Nation notice two years prior to expiration of the redemption period"); *Sherrill I*, 145 F. Supp. 2d at 257-58 (concluding that the City of Sherrill's foreclosure procedures violated due process for the same reason).

We are not persuaded that *McCann* should be read as the OIN suggests. The decision primarily concerned the constitutionality of a statute that provided a two-step tax-enforcement process, but did not require that any personal notice be given to property owners of the first step in that process, the tax lien sale. *See McCann*, 71 N.Y.2d at 176-77. To the extent that the Court of Appeals also considered the question of personal notice during the post-sale redemption period, it concluded only that such notice, if given late in the redemption period, does not make up for the fact that no personal notice had been given of the tax-lien sale in the first place. *Id.* at 177-78. We therefore conclude that the OIN misreads McCann in interpreting that decision to impose a rigid requirement that the commencement of the redemption period, and personal notice of the date of expiration of that period,

be perfectly contemporaneous, no matter the surrounding circumstances.

However, even if *McCann* could be read as articulating a requirement that personal notice of the date of expiration of a redemption period be given at the commencement of that period[23] -- or as suggesting that three months' advance

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23. At least one Appellate Division case has relied upon McCann for the proposition that a taxing authority may not provide a notice period significantly shorter in length than the redemption period to which the notice is addressed. In *Yagan v. Bernardi*, 256 A.D.2d 1225, 684 N.Y.S.2d 117 (4th Dep't 1998), the court ruled that the City of Syracuse failed to afford due process to a property owner because, after expiration of a one-year redemption period (during which no personal notice was given), the City mailed a notice to the owner permitting him only three weeks in which to redeem the property. The *Yagan* court ruled that the notice "ha[d] the effect of reducing the redemption period from one year to three weeks" and that it therefore "'d[id] not afford a realistic opportunity to produce the funds necessary to avoid forfeiture of the title or sell the encumbered property.'" *Id.* at 1226, 684 N.Y.S.2d at 119 (quoting *McCann*, 71 N.Y.2d at 178); *see also Lyon v. Estate of Cornell*, 269 A.D.2d 737, 738, 703 N.Y.S.2d 325, 326 (4th Dep't 2000) (relying on *Yagan* and holding that eighteen days' advance notice of a tax sale was "insufficient as a matter of law to provide the Estate with sufficient time to present its objections").

Most New York courts that have cited *McCann*, however, appear instead to rely on that decision for its principal holding that due process requires personal notice to a landowner prior to a tax-lien sale, and that subsequent personal notice of the expiration of the redemption period alone does not suffice. *See, e.g., Zaccaro ex rel. Zaccaro v. Cahill*, 100 N.Y.2d 884, 889, 800 N.E.2d 1096, 768 N.Y.S.2d 730 (2003); *Garden Homes Woodlands Co. v. Town*

notice of the expiration of a period is constitutionally insufficient -- neither we nor the district court are bound by any such holding. *McCann* rested solely on an interpretation of the Due Process Clause of the Fourteenth Amendment. *See id.* at 169-70; *id.* at 179 (Simons, J., dissenting). Federal courts are not bound to follow a state court's interpretation of the federal Constitution. *See Carvajal v. Artus*, 633 F.3d 95, 109 (2d Cir. 2011); *CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 266 (2d Cir. 2009).

Moreover, we do not regard as persuasive an interpretation of the Due Process Clause that would impose a rigid requirement as to the precise timing with which notice must be given.[24] "The due process right to

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of Dover, 95 N.Y.2d 516, 519, 742 N.E.2d 593, 720 N.Y.S.2d 79 (2000); *Szal v. Pearson*, 289 A.D.2d 562, 562, 735 N.Y.S.2d 200, 201 (2d Dep't 2001); *Meadow Farm Realty Corp., Ltd. v. Pekich*, 251 A.D.2d 634, 635-36, 676 N.Y.S.2d 203, 205 (2d Dep't 1998); *Anthony v. Town of Brookhaven*, 190 A.D.2d 21, 26, 596 N.Y.S.2d 459, 461-62 (2d Dep't 1993); *T.E.A. Marine Auto. Corp. v. Scaduto*, 181 A.D.2d 776, 779-80, 581 N.Y.S.2d 370, 373-74 (2d Dep't 1992); *Metz v. Dorsey*, 146 A.D.2d 845, 846-47, 536 N.Y.S.2d 250, 252 (3d Dep't 1989); *LVF Realty Co. v. Harrington*, 146 A.D.2d 607, 609, 536 N.Y.S.2d 840, 841-42 (2d Dep't 1989); *see also Quinn v. Wright*, 72 A.D.3d 1052, 1053-54, 900 N.Y.S.2d 135, 136-37 (2d Dep't 2010) (citing *Szal v. Pearson* and confirming that "[a] notice to redeem that is served after the tax sale in a manner that provides adequate due process protections to the property owner does not alleviate a failure to provide constitutionally-adequate notice of the tax sale").

24. If *McCann* had indeed intended to hold that perfect temporal alignment is required between the commencement of a redemption period and the notice of that period's date of expiration,

fair notice is a . . . general rule of law that demands a substantial element of judgment and [that] can hardly be implemented mechanically." *Ortiz v. N.Y.S. Parole in Bronx, N.Y.*, 586 F.3d 149, 157 (2d Cir. 2009) (citation and internal quotation marks omitted); *see also Gilbert v. Homar*, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997); *Baker*, 72 F.3d at 254; *In re Drexel Burnham Lambert Grp. Inc.*, 995 F.2d 1138, 1144 (2d Cir. 1993) (observing that due-process notice requirement should not be interpreted "so inflexibly as to make it an 'impractical or impossible obstacle[].'" (quoting *Mullane*, 339 U.S. at 314) (alteration in *In re Drexel*)).

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the New York courts themselves have not followed that rule. *See, e.g., Carney v. Philippone*, 1 N.Y.3d 333, 342-43, 806 N.E.2d 131, 136-37, 774 N.Y.S.2d 106, 111-12 (2004) (interpreting the Onondaga County Tax Act as providing a two-year redemption period and requiring six months' advance personal notice of expiration, and holding that that arrangement was "consonant with the requirements of due process"). Moreover, Article 11 of the RPTL -- the statute governing the tax-enforcement process followed by Madison County -- has routinely been held or assumed to be constitutional. *See, e.g., Harner v. County of Tioga*, 5 N.Y.3d 136, 141, 833 N.E.2d 255, 258, 800 N.Y.S.2d 112, 115 (2005) (no due process violation where County's notice procedures "fully compl[ied]" with Article 11 of the RPTL); *Kennedy*, 100 N.Y.2d at 9 (observing that "RPTL 1125 essentially encapsulated the two requirements of *Mullane* and *Mennonite*" and explicitly upholding its notice procedures as constitutional); *see also In re Foreclosure of Tax Liens by County of Schuyler*, 83 A.D.3d 1243, 1246, 921 N.Y.S.2d 376, 379 (3d Dep't 2011); *In re Foreclosure of Tax Liens by County of Sullivan*, 79 A.D.3d 1409, 1411, 912 N.Y.S.2d 786, 788 (3d Dep't 2010); *In re Foreclosure of Tax Liens*, 72 A.D.3d 1636, 1637, 900 N.Y.S.2d 524, 525 (4th Dep't 2010); *In re City of Lockport*, 187 A.D.2d 993, 993, 593 N.Y.S.2d 472, 472-73 (4th Dep't 1992).

Having considered and rejected the OIN's reading of *McCann*, we conclude that the OIN has failed to demonstrate that the notice it received from the Counties was constitutionally insufficient. The OIN does not deny that it received actual notice of the date of expiration of the redemption periods and that, in each case, it received such notice well in advance of the deadline -- indeed, further in advance than the Counties' standard practices require. *Cf. Goodrich v. Ferris*, 214 U.S. 71, 81, 29 S. Ct. 580, 53 L. Ed. 914 (1909) ("[O]nly in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time." (internal quotation marks omitted)).

And, critically, the OIN has not proffered any evidence that it suffered injury from the Counties' alleged failure to provide personal notice of the expiration of the redemption period any earlier. As the State of New York argues in its amicus brief, "[t]he OIN has not suggested that its vigorous defense of the foreclosure proceedings was disadvantaged in any particular way by the length of the notice it received." New York State Amicus Br. at 21 n.8.

To the contrary, the record reflects that the OIN had sufficient notice of the Counties' tax-enforcement proceedings to apprise it of its right of redemption and to enable it to take appropriate steps to protect its property interests before the redemption period expired. The OIN proved able, among other things, to file a detailed answer in March 2005 to Madison County's state-court petition for foreclosure; to initiate litigation and seek relief in federal court against each County prior to the expiration of the

respective redemption deadlines; to redeem properties in a timely fashion when it saw fit to do so; and to negotiate with the Counties to extend redemption deadlines on mutually agreeable terms. And the OIN does not deny that it long has had actual knowledge of the Counties' respective tax-enforcement efforts.

The OIN argues that it is immaterial that it had actual knowledge of the Counties' tax-enforcement activities, because it asserts that the redemption periods could not even begin to run until the OIN was first served with personal notice of the date of expiration of the redemption period. We disagree. "Process is not an end in itself," *Holcomb v. Lykens*, 337 F.3d 217, 224 (2d Cir. 2003) (internal quotation marks omitted), and "due process is not offended by requiring a person with actual, timely knowledge of an event that may affect [the person's] right to exercise due diligence and take necessary steps to preserve that right," *Medaglia*, 52 F.3d at 455. The OIN may not rely upon the dictates of procedural due process as a means of forestalling the Counties' foreclosure efforts because, here, the requirements of the Due Process Clause -- notice and an opportunity to respond -- were plainly fulfilled.

The OIN has thus failed to establish any genuine dispute as to the fact that it received notice sufficient to "'apprise [it] of the pendency of the action and afford [it] an opportunity to present [its] objections.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314); *see also NYCTL 1998-2 Trust v. Avila*, 29 A.D.3d 965, 966, 815 N.Y.S.2d 725, 727 (2d Dep't 2006) (affirming foreclosure

where respondent "failed to demonstrate any prejudice to a substantial right as a result of the alleged deficiency in notice"). The Counties are entitled to summary judgment in their favor on the OIN's due-process claims.

We have considered the parties' remaining arguments with respect to the OIN's due-process claims, and we conclude that they are either without merit or no longer require consideration in light of our resolution of these appeals.

IV. State Tax Law

The final ground for the district court's judgments was its determination that the OIN's properties are exempt from taxation as a matter of New York state law. *See Oneida County I*, 432 F. Supp. 2d at 290; *Madison County I*, 401 F. Supp. 2d at 231. In reaching that conclusion, the court relied upon New York RPTL § 454, which provides in pertinent part that "[t]he real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation," (emphasis added), and upon New York Indian Law ("NYIL") § 6, which provides that "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same" (emphasis added).

These state-law claims fell, at the time, within the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). Although federal courts may exercise jurisdiction

over related state-law claims where an independent basis of subject-matter jurisdiction exists, *see, e.g., Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 332 (2d Cir. 2011), such a court may, for various reasons, nonetheless "decline to exercise supplemental jurisdiction over a claim," 28 U.S.C. § 1367(c). These reasons include that "the claim raises a novel or complex issue of State law," *id.* § 1367(c)(1); that "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," *id.* § 1367(c)(2); that "the district court has dismissed all claims over which it has original jurisdiction," *id.* § 1367(c)(3); or that "exceptional circumstances" exist such that "there are other compelling reasons for declining jurisdiction," *id.* § 1367(c)(4). "'[T]he issue whether [supplemental] jurisdiction has been properly assumed is one which remains open throughout the litigation.'" *Rounseville v. Zahl*, 13 F.3d 625, 631 (2d Cir. 1994) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)); accord *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 445 (2d Cir. 1998) (noting that the supplemental-jurisdiction inquiry should be undertaken "at every stage of the litigation" (internal quotation marks omitted)).

Although the decision whether to decline to exercise supplemental jurisdiction is "purely discretionary," *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 129 S. Ct. 1862, 1866, 173 L. Ed. 2d 843 (2009), that discretion is, of course, subject to boundaries. For example, we have repeatedly said that "if a plaintiff's federal claims are dismissed before trial, 'the state law claims should be

dismissed as well.'" *Brzak v. United Nations*, 597 F.3d 107, 113-14 (2d Cir. 2010) (quoting *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008)), *cert. denied*, 131 S. Ct. 151, 178 L. Ed. 2d 243 (2010).

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988), the Supreme Court enumerated several factors that courts should weigh in considering whether to exercise supplemental jurisdiction -- "the values of judicial economy, convenience, fairness, and comity," *id.* at 350 -- and suggested that "in the usual case in which all federal-law claims are eliminated before trial, the balance of [those] factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* at 350 n.7; accord *Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 262-63 (2d Cir. 2006), *cert. granted*, 550 U.S. 956, 127 S. Ct. 2431, 167 L. Ed. 2d 1129, *cert. dismissed*, 552 U.S. 1085, 128 S. Ct. 828, 169 L. Ed. 2d 624 (2007); *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006); *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305-06 (2d Cir. 2003) (collecting cases). This Court has concluded that declining to exercise jurisdiction after all original-jurisdiction claims have been dismissed is especially appropriate where the pendent claims present novel or unsettled questions of state law. *See, e.g.*, *Cave*, 514 F.3d at 250; *Klein & Co.*, 464 F.3d at 263 n.5; *Kolari*, 455 F.3d at 124 (favoring principle that "state-law claims raising unsettled questions of law" should be dismissed without prejudice under 28 U.S.C. § 1367(c)(3), and collecting cases); *Valencia*, 316 F.3d at 306-08.

Because we have now ordered that the OIN's due process claims be dismissed, there remain no further

federal claims supporting the district court's award of injunctive relief. The OIN argues, however, that we should exercise our discretion in favor of retaining supplemental jurisdiction over the OIN's state-law claims even if all of its federal claims are dismissed. In its letter-brief on remand, the OIN urges us to affirm the district court's judgments on the basis that the properties in question constitute lands within "any Indian reservation" for the purposes of RPTL § 454 and NYIL § 6. They rely upon the recent case of *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 930 N.E.2d 233, 904 N.Y.S.2d 312 (2010), in which the New York Court of Appeals concluded that fee-title lands purchased by the Cayuga Indian Nation fell within the definition of "qualified reservation" for the purposes of two New York cigarette-sales-tax statutes, N.Y. Tax Law §§ 470(16) and 471-e. *See Gould*, 14 N.Y.3d at 635-46. The New York Court of Appeals decided that "when the Legislature used the term 'reservation' in Tax Law § 470(16)(a), it intended to refer to any reservation recognized by the United States government." *Id.* at 637; *see also id.* at 638 ("[T]he 'qualified reservation' question distills to whether the convenience store parcels are viewed as reservation property under federal law."). The Court then determined that "the United States government continues to recognize the existence of a Cayuga reservation in New York," *id.* at 640, and observed that the Supreme Court's decision in *Sherrill III* "d[id] not establish that the convenience stores are not located on a reservation," *id.* at 643. The OIN now argues that by virtue of the Court of Appeals' decision in *Gould*, the OIN's properties would also necessarily constitute lands on "any Indian reservation" for the purposes of RPTL § 454 or NYIL § 6.

We do not think that *Gould* settled the open questions presented by the OIN's remaining state-law claims. Indeed, in *Gould* itself, the majority expressly reserved the question whether fee-title lands purchased by Indian tribes on the open market would count as "reservation" land for the purposes of RPTL § 454 and NYIL § 6. *See Gould*, 14 N.Y.3d. at 646 (explaining that "terms found in Tax Law § 470(16)(a) will not necessarily be accorded the same meaning when they appear in other statutory contexts," expressly including NYIL § 6 and RPTL § 454). The Court of Appeals set forth various reasons why the meaning of the term "reservation" could be different under other state statutes. *See id.* (noting, *inter alia*, that Tax Law § 470(16)(a) was explicitly patterned after a federal statute; that the state statute was enacted after the Supreme Court's decision in *Sherrill III*; and that its statutory structure reflected a distinction between an Indian nation's exercise of "governmental power" and the "reservation status" of its land). We therefore cannot say with any certainty or authority how the Court of Appeals would interpret NYIL § 6 or RPTL § 454.

We think that at this stage of the litigation, several grounds enumerated by section 1367(c) for declining to exercise supplemental jurisdiction are implicated. First, the OIN's declaratory claims under NYIL § 6 and RPTL § 454 raise "novel [and] complex issue[s] of State law."[25]

25. The OIN and the Counties appear to agree that the term "Indian reservation," as used within NYIL § 6 and RPTL § 454, should be defined by reference to federal law. *See, e.g.*, OIN Br. at 86 (arguing that the state exemptions are "really issues of federal reservation status"); Counties' Reply Ltr.-Br. at 5 (arguing that the

28 U.S.C. § 1367(c)(1). As the Supreme Court has warned, "[a] federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79; *see also Rivkin v. Century 21 Teran Realty LLC*, 494 F.3d 99, 103-04 (2d Cir. 2007).

Second, almost all of the OIN's federal claims -- with just one narrow exception[26] -- have now been dismissed. *Cf.* 28 U.S.C. § 1367(c)(3). Even if the existence of one narrow surviving federal claim means that not "all claims over which [the district court] has original jurisdiction" have been dismissed, *id.* (emphasis added), it has nonetheless

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New York Court of Appeals would likely "look[] to federal law to resolve the reservation issue"). The district court also appeared to assume, in the course of interpreting those state statutes, that the existence vel non of an "Indian reservation" should be defined by federal law. *See Oneida County I*, 432 F. Supp. 2d at 290; *Madison County I*, 401 F. Supp. 2d at 231. Although that interpretation of the state statutes may ultimately be proven correct, we disagree that it is appropriate for us to make such an assumption at this time. It is for the state courts, not us, to determine ultimately and definitively whether a term used in a state statute possesses an autonomous meaning under state law.

26. As we explain below, we conclude that the OIN is entitled under federal common law to a declaration that it is not liable for penalties and interest on taxes that accrued prior to the Supreme Court's March 29, 2005 decision in *Sherrill III*. That ruling does not, however, entitle the OIN to restrain the Counties from foreclosing on their properties. We do not regard our partial affirmance on the issue of penalties and interest as material to our analysis as to whether supplemental jurisdiction may be exercised under section 1367(c).

become clear that the state-law claims now "substantially predominate[]" in this litigation, *id.* § 1367(c)(2). "Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." *Gibbs*, 383 U.S. at 727; *see also*, *e.g.*, *Dargis v. Sheahan*, 526 F.3d 981, 991 (7th Cir. 2008) (survival of one federal due-process claim does not require court to retain jurisdiction over seven state-law claims); *Garro v. Department of Educ.*, 23 F.3d 734, 737 (2d Cir. 1994) (survival of an "insubstantial federal claim" does not require that jurisdiction be retained over state-law claim).

To be sure, the fact that one or more of the grounds for declining to exercise supplemental jurisdiction set forth in section 1367(c) applies does not mean that dismissal is mandated. *See* 28 U.S.C. § 1367(c) (providing that "[t]he district courts may decline to exercise supplemental jurisdiction" (emphasis added)). For this reason, we have said that "where at least one of the subsection 1367(c) factors is applicable," the court should not decline jurisdiction "unless it also determines that [exercising supplemental jurisdiction] would not promote the values . . . [of] economy, convenience, fairness, and comity." *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 214 (2d Cir. 2004) (citation omitted); *see also Itar-Tass Russian News Agency*, 140 F.3d at 446.

Here, though, we conclude -- in light of the "circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims,"

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 173, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (citing *Cohill*, 484 U.S. at 350) -- that the proper course is to decline to exercise jurisdiction over the OIN's supplemental state-law claims. Certification to the New York Court of Appeals might provide an alternate method for resolving these claims. *See* 2d Cir. Local R. 27.2; N.Y. Comp. Codes & Regs. tit. 22, § 500.27(a) (2008). However, under these circumstances, we think that it makes more sense for a New York state court to decide the OIN's state-law claims itself based on its understanding of its own law and its own findings of fact, than for us to assist a federal district court to do so indirectly by certification in a case that no longer presents any federal claims. It is also significant that there are already pending state-court proceedings in which the OIN appears to have raised the issue of its claimed state tax-law exemptions.[27] We therefore vacate the district court's grant of summary judgment with respect to the OIN's state-law claims, and remand with instructions to dismiss these claims without prejudice to re-filing in state court.

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27. In addition to the pending foreclosure proceedings involving Madison County, the OIN has also initiated various declaratory proceedings in state court under RPTL Article 7 or CPLR Article 78, against Madison County and others, seeking a ruling that its property is exempt from taxation as a matter of state law. It appears that the OIN sought to discontinue that proceeding in preference to this federal lawsuit, but that request was denied. *See Oneida Indian Nation of N.Y. v. Pifer*, 43 A.D.3d 579, 840 N.Y.S.2d 672 (3d Dep't 2007) (affirming trial court's denial of OIN's motion to discontinue lawsuit without prejudice). It is not clear to us what the status of that proceeding is at this time.

We have considered the parties' other arguments as to the legal status of the OIN's reservation under federal or state law, and we conclude that they are either without merit or they are no longer necessary to decide in light of our resolution of these appeals. And because no claims remain in support of the district court's injunctions restraining the Counties from foreclosing on OIN-owned property, nor has the OIN shown that injunctive relief is warranted in any other respect, we vacate those injunctions in their entirety.

V. Ancillary Matters

A. Penalties and Interest

In each of the parallel lawsuits, the district court ruled that by virtue of the OIN's tribal sovereign immunity from suit, the OIN was not liable to pay any penalties or interest on back taxes, and it entered injunctive relief accordingly. *See Oneida County II*, slip op. at 2; *Madison County I*, 401 F. Supp. 2d at 230. But, in light of the OIN's intervening waiver of immunity, we can no longer sustain the district court's injunction restraining the Counties from collecting penalties and interest on the basis of the OIN's tribal sovereign immunity from suit.

The OIN maintains, however, that there is an independent basis for restraining the Counties from assessing and collecting penalties and interest on back taxes, at least for the period of time prior to the Supreme Court's decision in *Sherrill III* issued on March 29, 2005. It contends that it would be inequitable to subject it to

liability for penalties and interest for a period of time during which the decisional law -- as reflected, *inter alia*, by this Court's decision in *Sherrill II* -- held that the OIN was not liable to pay property taxes at all.

The procedural history with respect to the issue of penalties and interest is somewhat convoluted. In seeking summary judgment in the Madison County litigation, the OIN argued that the Counties should be prevented from collecting penalties and interest on two grounds: (1) reasons of equity (as to the pre-*Sherrill III* period only), and (2) tribal sovereign immunity from suit (as to all periods). In its opposing filings, Madison County did not appear to respond to either argument. The district court, ruling in the OIN's favor, concluded that Madison County had acquiesced to the OIN's argument that it was not liable to pay penalties or interest at all. *See Madison County I*, 401 F. Supp. 2d at 230.

In the Oneida County suit, by contrast, the issue of penalties and interest was contested. In seeking summary judgment, the OIN argued -- just as it had in Madison County -- that penalties and interest were barred both by principles of equity (as to the pre-*Sherrill III* period only) and by the OIN's tribal sovereign immunity from suit (as to all periods). Oneida County responded by arguing that the OIN did not possess tribal immunity from liability for penalties and interest, but it did not squarely address the OIN's separate, equity-based argument. The district court initially ruled in the OIN's favor on the equity theory only, deciding that "[i]t would be inequitable to permit Oneida County to assess interest and penalties for non-payment

of taxes during a time when it was the law that the lands were not taxable." *Oneida County I*, 432 F. Supp. 2d at 291; *see also Madison County II*, 235 F.R.D. at 560 n.1 (noting contrast between district court's rulings on penalties and interest in the Oneida County and Madison County lawsuits).

The OIN then filed a post-judgment motion in the Oneida County litigation pursuant to Fed. R. Civ. P. 59 requesting that the district court amend its judgment so as to note that penalties and interest were barred not merely for the pre-*Sherrill III* period, but for all periods, by virtue of the OIN's tribal sovereign immunity from suit. The district court granted that motion and issued an amended judgment restraining Oneida County from assessing or collecting penalties and interest on unpaid taxes generally. *See Oneida County II*, slip op. at 2. Ultimately, then, the district court's decisions in both Madison County and Oneida County on the matter of penalties and interest rested on the same ground: tribal sovereign immunity from suit.

The OIN's positions on appeal with respect to this issue are difficult to reconcile. First, the OIN argued that because the Counties did not adequately brief the question of penalties and interest in their opening brief, the Counties should be held to have forfeited their defense on that issue. *See* OIN Br. at 58-59. Later, however, the OIN represented to the Supreme Court that "the parties continue to dispute . . . whether penalties and interest may be imposed for periods in which the lands were held to be tax-exempt," and that the issue "remain[s] to be litigated."

OIN December 2 Letter at 2. Now, on remand, the OIN has reverted to its previous position, asserting that because the Counties did not challenge on appeal any of the district court's rulings with respect to penalties and interest, they forfeited their right to contest the OIN's entitlement to relief from penalties and interest, including relief on equitable grounds as to the pre-*Sherrill III* period alone.

Despite this apparent inconsistency, we agree with the OIN that the Counties have forfeited their arguments in opposition to the OIN's argument that it is not liable for interest or penalties on taxes or related assessments that accrued prior to March 29, 2005. In the summary-judgment proceedings before the district court, neither County actively opposed the OIN's argument that it was entitled on grounds of equity to a declaration that it did not owe interest or penalties for the pre-*Sherrill III* period. To the contrary, Oneida County's summary-judgment briefing appeared implicitly to concede the point, even as it disputed the OIN's arguments with respect to the post-March 29, 2005 period. The OIN also correctly observes that in the Counties' opening brief on appeal, they barely mentioned the issue of penalties and interest, only arguing in a footnote that the Supreme Court's decision in *Sherrill III* "is fairly read to authorize local taxing authorities to collect penalties and interest from OIN." Counties' Br. at 52 n.16. Even after the OIN argued in its responsive brief that "[e]quity also bars imposition of penalties and interest for nonpayment of taxes prior to the Supreme Court's City of Sherrill decision," OIN Br. at 25; *see also id.* at 62-66, the Counties did not directly respond to that argument, but instead asserted only that the amount of interest and

penalties imposed was reasonable, *see* Counties' Reply Br. at 26.

Of course, the district court's rulings that the OIN was not liable to pay penalties or interest ultimately rested on the basis of tribal sovereign immunity from suit, not upon principles of equity. Based upon the district court's initial ruling in *Oneida County I*, however, we understand the district court also to have credited the OIN's argument that it was entitled to be free from paying penalties or interest as to the pre-March 29, 2005 period on equitable grounds. *See Oneida County I*, 432 F. Supp. 2d at 292 ("Equity precludes the imposition of penalties and interest for taxes unpaid during a time when the properties were tax-exempt under the law."); *id.* at 290-91 (similar). That ruling was sufficient to put the Counties on notice of the OIN's equitable argument.

We conclude that the OIN is entitled to a declaration that it is not liable to pay penalties or interest on taxes or related assessments that accrued prior to the Supreme Court's decision in *Sherrill III*. Because the OIN has not shown that a permanent injunction is necessary to protect its interests in this respect, we also conclude that this declaratory relief should suffice. *Cf. Wooley v. Maynard*, 430 U.S. 705, 711, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) ("[A] district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." (internal quotation marks omitted)).

B. Abstention

When this case was originally before us on appeal, the Counties argued that the district court erred as a matter of law by refusing to abstain from jurisdiction on the grounds that federal litigation would impermissibly interfere with state tax administration. The Counties relied upon 28 U.S.C. § 1341, which provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." In our original decision, we rejected this argument, concluding that the Supreme Court has "created an exception to the general rule barring federal interference with state tax administration" for suits brought by Indian tribes that the United States could have brought on a tribe's behalf as trustee. *Oneida I*, 605 F.3d at 160 (internal quotation marks omitted) (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 474-75, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976)).

In their petition for certiorari to the Supreme Court, the Counties did not challenge our ruling with respect to the matter of abstention. Nor do they address abstention in their letter-briefing on remand. But because our decision in *Oneida I* has been vacated, and because "a district court's determination not to abstain . . . implicates the court's subject matter jurisdiction," *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004), we raise the issue *sua sponte* and affirm the district court's decision not to abstain for substantially the same reasons outlined in our prior panel decision. *See Oneida I*, 605 F.3d at 160-61.

C. Stockbridge's Motions to Intervene

On appeal, the putative intervenor, Stockbridge, argues (1) that the district court erred in the Oneida County lawsuit by denying its Rule 24(a) motion to intervene as of right, and (2) that the district court erred in the Madison County lawsuit by refusing to grant leave to Madison County to file a Rule 19 motion to dismiss for failure to join Stockbridge as a party. In its reply letter-brief, Stockbridge asserts that "should this Court conclude that the issue of sovereign immunity is now moot . . . and proceed to address the question whether the [OIN's] land is tax-exempt under New York law, it should reconsider its ruling that Stockbridge does not have an interest in the subject of this litigation." Stockbridge Reply Ltr.-Br. at 4.

We need not reconsider our ruling in *Oneida I*. Here, as in *Oneida I*, the manner in which we resolve these appeals does not bear upon the question of the disputed boundaries between the OIN's and Stockbridge's respective land claims. *See Oneida I*, 605 F.3d at 163. Indeed, insofar as our resolution of these appeals does not reach "the question whether the [OIN's] land is tax-exempt under New York law," Stockbridge Reply Ltr.-Br. at 4, but dismisses those claims without prejudice instead, it would appear that Stockbridge concedes that it is unnecessary for us to revisit our prior ruling at this time.

Therefore, for substantially the same reasons stated in our decision in *Oneida I*, *see* 605 F.3d at 161-63 & n.9, we affirm the district court's denial of Stockbridge's Rule 24(a) intervention motion in Oneida County and its denial

of Madison County's motion to file a Rule 19 motion to dismiss in Madison County.

D. Disestablishment or Diminishment

Finally, we address the Counties' appeals from the district court's declarations that the ancient Oneida Nation's reservation was not disestablished by the 1838 Treaty of Buffalo Creek. *See Oneida County I*, 432 F. Supp. 2d at 292 (decreeing that "[the OIN's] reservation was not disestablished"); *Madison County I*, 401 F. Supp. 2d at 233 (same). In so ruling, the district court effectively dismissed the Counties' counterclaims seeking a declaration to the opposite effect.

When this case was previously before us on appeal, we declined to reach the Counties' argument that the OIN's reservation had been disestablished, in light of our conclusion that foreclosure was barred in any event by virtue of the OIN's tribal sovereign immunity from suit. *Oneida I*, 605 F.3d at 157 n.6. We nonetheless observed that the Supreme Court in *Sherrill III* had "explicitly declined to resolve the question of whether the Oneida reservation had been 'disestablished.'" *Id.* We concluded that "[o]ur prior holding on this question -- that 'the Oneidas' reservation was not disestablished' -- therefore remains the controlling law of this circuit." *Id.* (citation omitted) (quoting *Sherrill II*, 337 F.3d at 167).

Following our decision in *Oneida I*, the Counties petitioned for a writ of certiorari to review, *inter alia*, the question "whether the ancient Oneida reservation in

New York was disestablished or diminished." Counties' Cert. Petition at i. Because the Supreme Court vacated our judgment in light of the OIN's professed waiver of immunity and remanded for further proceedings, however, the Court did not have occasion to rule upon the disestablishment question. Nonetheless, relying upon the Supreme Court's intervening grant of certiorari, the Counties urge us to revisit our decision in *Sherrill II* that the Oneidas' reservation was not disestablished.

We decline the Counties' invitation. "This panel is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (internal quotation marks omitted). It remains the law of this Circuit that "the Oneidas' reservation was not disestablished," *Sherrill II*, 337 F.3d at 167. As we previously observed in *Oneida I*, the Supreme Court's decision in *Sherrill III* did not upset that determination. *See Oneida I*, 605 F.3d at 157 n.6.

Nor do we think that the fact that the Supreme Court granted certiorari to review our decision in *Oneida I* renders our decision in *Sherrill II* without legal effect. Our Court has spoken on the question of disestablishment. We therefore affirm the dismissal of the Counties' counterclaims.

CONCLUSION

For the foregoing reasons:

1. We vacate the district court's judgments to the extent that they granted summary judgment to the OIN on its now-abandoned claims related to: (1) the doctrine of tribal sovereign immunity from suit and (2) the Nonintercourse Act. We remand with instructions to the district court to dismiss those two claims with prejudice. Moreover, as the OIN has suggested, the amended judgments shall reflect this Court's understanding that the OIN's waiver of its tribal sovereign immunity from suit is "irrevocable." OIN December 2 Letter at 3.

2. We reverse the district court's judgments to the extent that they granted summary judgment on the OIN's claims that the Counties' redemption notices failed to comport with federal or state due-process requirements. We remand with instructions to enter judgment in favor of the Counties on these claims and to dismiss them with prejudice.

3. We vacate the district court's judgments to the extent that they granted summary judgment to the OIN on its claims that it is entitled under state law to exemptions from state and local property taxes. We remand with instructions to the district court to decline to exercise supplemental jurisdiction over these claims and to dismiss them without prejudice to their being brought in state court.

4. We affirm, but solely as to property taxes and related assessments accruing prior to March 29, 2005, the district court's ruling that the OIN is not liable for payment of penalties or interest, and we conclude that the OIN is entitled to a declaration to that effect.

5. We affirm the district court's decisions: declining to abstain from this litigation under 28 U.S.C. § 1341; denying Stockbridge's motions to intervene and denying Madison County's motion for leave to file a Rule 19 motion to dismiss; and dismissing each County's declaratory counterclaims.

6. Because no claims remain that would entitle the OIN to injunctive relief barring the Counties from carrying out their respective tax-enforcement procedures, and because the OIN has not shown that injunctive relief is warranted in any other respect, we vacate the district court's injunctions in their entirety.

7. We direct the district court to enter an amended judgment in each lawsuit reflecting these rulings.

Costs of these proceedings shall be borne by the OIN.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED APRIL 27, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

Docket No. 05-6408-cv (L); 06-5168-cv (CON);
06-5515-cv (CON)

(Argued: November 6, 2007
Final submission: July 20, 2009
Decided: April 27, 2010)

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff-Counter-Defendant-Appellee,

- v -

MADISON COUNTY AND ONEIDA COUNTY, NEW YORK,

Defendants-Counter-Claimants-Appellants,

STOCKBRIDGE-MUNSEE COMMUNITY, BAND OF MOHICAN INDIANS,

Putative Intervenor-Appellant.[*]

* The Clerk of Court is directed to amend the official caption of this appeal in accordance with the foregoing.

Appendix B

SACK, Circuit Judge:

This appeal is but the latest chapter in a lengthy dispute over the payment of state and local taxes by the plaintiff-appellee Oneida Indian Nation of New York (the "OIN"). The Supreme Court most recently addressed the OIN's tax obligations in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill*"). The Court rejected the OIN's contention that parcels of lands allegedly within the boundaries of an Indian reservation once occupied by the Oneidas, which were sold to non-Indians during the early 19th century and bought back by the OIN on the open market in the 1990s, thereby came under the sovereign dominion of the OIN and were therefore exempt from municipal taxation. [1] The OIN nonetheless now seeks to enjoin the defendants-appellants Madison and Oneida Counties (the "Counties") from foreclosing on this property for non-payment of county taxes. On cross-motions for

1. The OIN's suit against Madison County, which is one of the actions consolidated in this appeal, was once consolidated with three other actions involving the City of Sherrill. *See Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 223 (N.D.N.Y. 2005) (explaining history). In *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139 (2d Cir. 2003), this Court ruled in favor of the OIN with respect to those three other actions, but vacated the Madison County action, which we found to have been dealt with in a "procedurally improper" manner by the district court. *Id.* at 170; *see also id.* at 145-46, 171. The Supreme Court granted certiorari with respect to the three actions in which we had ruled in the OIN's favor, and reversed in *Sherrill*, 544 U.S. 197. The instant case is thus closely related to *Sherrill*, although it does not involve any identical actions.

summary judgment brought in both of the cases that are consolidated on this appeal, the district court ruled in favor of the OIN. *See Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 292 (N.D.N.Y. 2006) ("*Oneida County*"); *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 232-33 (N.D.N.Y. 2005) ("*Madison County*"). We affirm on the ground that the OIN is immune from suit under the long-standing doctrine of tribal sovereign immunity. The remedy of foreclosure is therefore not available to the Counties.

The Stockbridge-Munsee Community, Band of Mohican Indians ("Stockbridge")[2] filed a motion to intervene in *Oneida County* pursuant to Federal Rule of Civil Procedure 24(a), with the goal of obtaining dismissal of that action to the extent that the land at issue was found to overlap with Stockbridge's purported six-square-mile reservation. The district court rejected Stockbridge's motion, finding that Stockbridge could not demonstrate an interest in the *Oneida County* litigation. *See* 432 F. Supp. 2d at 291-92. We conclude that this was not an abuse of discretion.

BACKGROUND

The history of the land at issue here and transactions affecting it has been set forth at some length in several other opinions of this and other courts. *See, e.g.*, *Sherrill*, 544 U.S. at 203-12; *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 146-52 (2d Cir. 2003) ("Oneida

2. Stockbridge is referred to by various similar names in the papers before us. We employ that used by its counsel in its brief submitted to this Court.

Indian Nation of N.Y."), *rev'd*, *Sherrill*, 544 U.S. 197; *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 232-36 (N.D.N.Y. 2001), *aff'd in part, vacated and remanded in part*, *Oneida Indian Nation of N.Y.*, 337 F.3d 139, *rev'd*, *Sherrill*, 544 U.S. 197. We recite only those facts that we think are necessary for an understanding of our resolution of this appeal.

The OIN's Land

The OIN is a federally recognized Indian Tribe that is directly descended from the Oneida Indian Nation ("Oneida Nation").[3] The Oneida Nation's lands once encompassed some six million acres in what is now central New York State. In 1788, pursuant to the Treaty of Fort Schuyler between the Oneida Nation and the State of New York, the Nation ceded title to nearly all of its land to the State, retaining a reservation of only approximately 300,000 acres. *Sherrill*, 544 U.S. at 203.

In 1790, Congress passed the first Indian Trade and Intercourse Act. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137

3. Despite our use of the "OIN" acronym, the Oneida Indian Nation of New York should not be confused with the original Oneida Indian Nation, which is not a federally recognized tribe and is not a party to these consolidated cases. . . . [T]he original Oneida Indian Nation became divided into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Canadian Oneidas, by the middle of the nineteenth century.

Oneida Indian Nation of N.Y., 337 F.3d at 144 n.1.

("Nonintercourse Act"). The Nonintercourse Act, which remains substantially in force today, bars the sale of tribal land without federal government acquiescence. *Sherrill*, 544 U.S. at 204. In spite of the provisions of the Act, towards the end of the 18th century and at the beginning of the 19th century, the Oneida Nation sold substantial portions of the remaining reservation land to New York State and to private parties without the federal supervision that the Act required. *See id.* at 205-06; *Oneida Indian Nation of N.Y.*, 337 F.3d at 147-48. *See also United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 940 (Ct. Cl. 1973) (concluding that the federal government owed a fiduciary duty to protect members of the Oneida Nation in connection with their land dealings with New York State between 1795 and 1846). That land was subsequently sold to non-Indians in free-market transactions. *See Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d at 234 & n.3. By 1838, the Oneida Nation had sold all but 5,000 acres of the reservation that had been created by the Treaty of Fort Schuyler. *See Sherrill*, 544 U.S. at 206. By 1920, that number had dwindled to thirty-two acres. *Id.* at 207.

Beginning in 1970, descendants of members of the Oneida Nation pursued federal litigation against local governments in New York in an effort to assert that certain of New York State's purchases of reservation land during the late 18th and early 19th centuries had been in violation of the Nonintercourse Act, and therefore had not terminated the Oneidas' right to possess the land. *See id.* at 208-11 (summarizing cases). In the 1990s, OIN tribe members also began to purchase, through open-market

transactions, land that had once been a part of the Oneida Nation's reservation. *See Oneida Indian Nation of N.Y.*, 337 F.3d at 144.

The Supreme Court's Decision in Sherrill

At issue in *Sherrill* were parcels of land in the city of Sherrill (located in Oneida County, New York) that had originally been part of the Oneida Nation reservation as established by the Treaty of Fort Schuyler, but that had been transferred by the Oneida Nation to one of its members in 1805, and then in 1807 sold by that person to a non-Indian. *Sherrill*, 544 U.S. at 211. The OIN re-acquired these parcels on the open market in 1997 and 1998. *Id.* In *Sherrill*, the OIN asserted that these properties were exempt from taxation, arguing

> that because the Court in [*Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985)[4]] recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels.

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4. In this 1985 case, the Court permitted the OIN to seek monetary damages for the sale of its land in the late 18th and early 19th centuries, but "reserved for another day the question whether 'equitable considerations' should limit the relief available to the present-day Oneidas." *Sherrill*, 544 U.S. at 213 (citing *Oneida County, N.Y.*, 470 U.S. at 253, n.27).

Id. at 213. Based on that contention, the OIN had brought suit in the United States District Court for the Northern District of New York seeking injunctive and declaratory relief that would require recognition of its present and future sovereign immunity from local taxation on the land. *Id.* at 214. We agreed on the basis that "land in Indian country . . . is not subject to state taxation absent express congressional authorization." *Oneida Indian Nation of N.Y.*, 337 F.3d at 154 (citing, *inter alia*, *Worcester v. State of Ga.*, 31 U.S. 515, 557 (1832), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)).

The Supreme Court reversed. It "reject[ed] the unification theory of OIN and the United States and h[e] ld that 'standards of federal Indian law and federal equity practice' preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold." *Sherrill,* 544 U.S. at 214. Noting that "justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight," *id.* at 215-16, the Court concluded:

> [T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

Id. at 221.

Appendix B

Madison County's Actions

Madison County has regularly assessed taxes with respect to the parcels of land in the county that were purchased by the OIN in the 1990s that are claimed to lie within the boundaries of the reservation described in the Treaty of Fort Schuyler. *See Madison County,* 401 F. Supp. 2d at 223. Each year in which the OIN failed to pay property taxes, Madison County would initiate foreclosure proceedings against the OIN-owned parcels as part of its yearly foreclosure actions in state court. Madison County would then abandon the foreclosure proceedings against the OIN-owned parcels, in anticipation of a resolution of the taxability question in *Sherrill*, when it became clear that the *Sherrill* litigation would continue for another year. *Id.* Madison County initiated and then abandoned foreclosure proceedings in this manner in each year until 2003, *id*., when this Court effectively separated the on-going *Madison County* litigation from the *Sherrill* litigation and remanded it to the district court for further proceedings, *see Oneida Indian Nation of N.Y.*, 337 F.3d at 171.

On November 14, 2003, the county instituted a foreclosure action with respect to such OIN-owned property in New York State court. *Madison County*, 401 F. Supp. 2d at 223. This time, however, the county did not abandon these foreclosure proceedings as it has done in previous years. A Petition and Notice of Foreclosure was mailed to the owners of property that the county was seeking foreclosure upon for non-payment of taxes, including the OIN, on December 8, 2004, and was published in December 2004 and January 2005. *Id.* It specified March 31, 2005, as

the last day for redemption of these properties.[5] *Id.* The Supreme Court decided *Sherrill* on March 29, 2005, just two days before this final day of redemption. *Id.* On April 28, 2005, Madison County moved for summary judgment in the 2003 state court foreclosure action. *Id.* In the instant federal proceedings, however, which had been pending in the district court following this Court's remand in 2003, the district court issued a preliminary injunction enjoining the state foreclosure proceedings. *See id.*; *Oneida Indian Nation of N.Y. v. Madison County*, 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005).

Oneida County's Actions

Oneida County follows a property tax foreclosure procedure that is different from Madison County's. Pursuant to county law, the county arranges for and advertises a tax auction for the sale of any property on which taxes, which are uniformly due on January 31, are delinquent by six months or more. *See Oneida County*, 432 F. Supp. 2d at 287. The tax sale is held on the last business day of December. *Id.* The delinquent taxpayer then has

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5. New York Real Property Tax Law § 1110 requires at least two years of notice prior to the expiration of a redemption period. The OIN contends, and the district court agreed, that it was a violation of constitutional due process guarantees for the county to fail to comply with this two-year notice provision by issuing notice on December 8, 2004, that the redemption period would expire on March 31, 2005, less than two years later. Because we decide this case on other grounds, we need not and do not reach this ruling. We also do not reach a similar due process argument that is made with respect to Oneida County's foreclosure procedures.

three years to redeem the property, and an additional thirty days following receipt of a Final Notice Before Redemption. *Id.* at 287-88. This process was adhered to with respect to all 280 OIN-owned parcels located within both Oneida County and, allegedly, the reservation boundaries established by the Treaty of Fort Schuyler. During the summer and early autumn of 2005, Final Notices Before Redemption were delivered to the OIN regarding 187 of those parcels. *Id.* at 288. On October 28, 2005, the OIN sought and received a restraining order preventing further foreclosure efforts against any of the 280 parcels, pending this outcome of this litigation. *See id.*

Stockbridge

Stockbridge seeks to intervene in these proceedings based on its contention that fifty-two land parcels (two in Oneida County and fifty in Madison County) are part of an undiminished reservation of the Stockbridge Band rather than the Oneidas. There is litigation pending addressing this claim in the Northern District of New York. *See Stockbridge-Munsee v. State of New York*, No. 3:86-CV-1140 (N.D.N.Y. Oct. 15, 1986). Stockbridge argues that the Treaty of Fort Schuyler set aside a six-square-mile permanent reservation for the Stockbridge Band, separate from a surrounding 250,000 acre tract reserved for the Oneidas.

District Court Proceedings

In both of the cases consolidated on appeal, the district court concluded that the remedy of foreclosure was not available to the Counties on four independent grounds:

1) the Nonintercourse Act renders the OIN's properties inalienable and therefore not subject to foreclosure, *see Madison County*, 401 F. Supp. 2d at 227; *Oneida County*, 432 F. Supp. 2d at 289; 2) tribal sovereign immunity bars suit against the OIN, *see Madison County*, 401 F. Supp. 2d at 228-29; *Oneida County*, 432 F. Supp. 2d at 289; 3) the Due Process Clause of the Fifth Amendment was violated by the Counties' failure to give the OIN adequate notice of the expiration of the redemption period, *see Madison County*, 401 F. Supp. 2d at 230; *Oneida County*, 432 F. Supp. 2d at 289-90; and 4) the land in question is exempt from taxation under New York State law, *see Madison County*, 401 F. Supp. 2d at 231; *Oneida County*, 432 F. Supp. 2d at 290.

The district court denied Stockbridge's motion to intervene in *Oneida County* on the ground that Stockbridge could not demonstrate sufficient interest in the litigation. *See* 432 F. Supp. 2d at 291-92.

The Counties appeal from the grant of summary judgment against them. Stockbridge appeals from the district court's denial of its motion to intervene. The State of New York appears as amicus curiae in support of the Counties, urging us to reverse the decision of the district court. Upon order of this Court, the United States also submitted a brief as amicus curiae. In that brief, the United States urges us to affirm on the ground that the OIN's tribal sovereign immunity bars the Counties' efforts to foreclose on OIN-owned land.

Since this Court heard oral argument in this matter, there have been several developments that affect the

practical implications of this Court's decision on Madison and Oneida Counties. While these developments do not render moot any of the issues before this Court on appeal, we think it useful to describe them briefly.

In a Record of Decision issued on May 20, 2008, in response to the OIN's application, the Department of the Interior determined that it would take 13,003.89 acres of the OIN-owned land at issue in this appeal into trust, pursuant to 25 U.S.C. § 465 and 25 C.F.R. Part 151. *See* Department of the Interior, Record of Decision, May 20, 2008 ("Record of Decision"). Notice of this decision was published in the Federal Register on May 23, 2008. 73 Fed. Reg. 30144. This land will no longer be subject to state or local taxation. 25 U.S.C. § 465. As a result, only approximately 4,000 of the 17,000 acres of property originally at issue in this case will remain subject to state and local taxation in the future.

In connection with the land trust, in order to satisfy the trust regulations, the OIN has posted letters of credit securing the payment of all taxes, penalties, and interest determined by the courts to be due on the land at issue and has agreed to supplement or replace those letters to secure payment of any additional penalties and interest that may accrue while litigation concerning the trust decision is pending. Record of Decision at 53. These letters cover substantially all taxes, penalties, and interest assessed on all of the OIN-owned property at issue in this case, including those parcels that the Department of the Interior has decided not to take into trust. Accordingly, notwithstanding this Court's decision on this appeal, it appears that the Counties will receive back payment of all

taxes, penalties, and interest due on the property at issue in this lawsuit. Despite this development and the practical implications it has for the parties in this case, we reiterate that it does not render moot any of the issues raised on nor affect our consideration of this appeal.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998); *see also* Fed. R. Civ. Pro. 56(c).

II. Tribal Sovereign Immunity

A. The Distinction Between Sovereign Authority Over Reservation Lands And Sovereign Immunity From Suit

The Counties assert that the Supreme Court's decision in *Sherrill* requires reversal here because the *Sherrill* Court ruled that the land in question is not sovereign tribal land, and it is therefore subject to taxation. The Counties interpret *Sherrill* to hold that the OIN cannot assert sovereign immunity to prevent a foreclosure action on such land.

We think that this argument improperly conflates two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit. The freedom from state taxation, in the broader context of immunity from state regulation, which is addressed in *Sherrill*, arises from a tribe's sovereign authority over its reservation lands. This sovereign authority was examined by the Supreme Court as early as 1832:

> 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 . . . .

Worcester v. State of Ga., 31 U.S. 515, 556-57 (1832) (Marshall, C.J.), abrogated on other grounds as recognized by *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (remarking that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation."). "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester* . . . has given way to more individualized treatment of particular treaties and specific federal statutes." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

But the Supreme Court has "categorical[ly]" maintained that "[a]bsent cession of jurisdiction or other federal

statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (internal quotation marks omitted). This principle has been traced in later Supreme Court decisions to *Worcester* and other cases of its era. *See, e.g.*, *id.* at 257-58; *Mescalero*, 411 U.S. at 148; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

When the Supreme Court held in *Sherrill* that the OIN could not "rekindl[e] embers of sovereignty that long ago grew cold," 544 U.S. at 214, the sovereignty to which it was referring was of the sort described in *Worcester* and its progeny. Indeed, the decision of this Court that *Sherrill* reversed had focused on this land-based "Indian sovereignty doctrine," *Oneida Indian Nation of N.Y.*, 337 F.3d at 155 (internal quotation marks omitted), that had emerged from *Worcester* and other 19th century cases, *see id.* at 153-55. The Supreme Court applied this doctrine to the facts at hand in *Sherrill* when rejecting the OIN's prayer for relief.

That doctrine is different, however, from the doctrine of tribal immunity from suit. While the tax exemption of reservation land arises from a tribe's exercise of sovereignty over such land, and is therefore closely tied to the question of whether the specific parcel at issue is "Indian reservation land," *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998), a tribe's immunity from

suit is independent of its lands.[6] *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) ("[O]ur cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred.").

The doctrine of tribal immunity from suit has a distinctive history in the Supreme Court. As the Court explained in *Kiowa*:

> Though the doctrine of tribal immunity [from suit] is settled law and controls this case, we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court's opinion in *Turner v. United States*, 248 U.S. 354 (1919). Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition.
>
> . . . .

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6. Thus, we need not reach the Counties' argument that the OIN's reservation has been disestablished. Our conclusion does not depend upon it. We note, however, that the Supreme Court in Sherrill explicitly declined to resolve the question of whether the Oneida reservation had been "disestablished," thus rendering the land in question no longer part of a reservation or otherwise part of "Indian country" as defined by 18 U.S.C. § 1151. *Compare Sherrill*, 544 U.S. at 214 n.8 ("We resolve this case on considerations not discretely identified in the parties' briefs .. .

(Cont'd)

> *Turner*'s passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit. We so held in [*United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940)], saying: "These Indian Nations are exempt from suit without Congressional authorization." [*Id.*] at 512 (citing *Turner, supra,* at 358). As sovereigns or quasi sovereigns, the Indian Nations enjoyed immunity "from judicial attack" absent consent to be sued. Later cases, albeit with little analysis, reiterated the doctrine.
>
> The doctrine of tribal immunity came under attack a few years ago in *[Okla. Tax Comm'n v. Citizen Band] Potawatomi [Indian Tribe of Okla.*, 498 U.S. 505 (1991)] . . . . We retained the doctrine, however, on the theory that Congress had failed to abrogate it . . . .

(Cont'd)
. .") with *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 2004 U.S. S. Ct. Briefs LEXIS 492 at **1, 2004 WL 1835364 at *i, (U.S. Aug. 12, 2004) (Appellate Br. for Pet.) (stating that one of the questions presented for review was "[w]hether alleged reservation land is Indian country pursuant to 18 U.S.C. § 1151 . . . ."). Our prior holding on this question — that "the Oneidas' reservation was not disestablished," *Oneida Indian Nation of N.Y.*, 337 F.3d at 167 — therefore remains the controlling law of this circuit. *See, e.g., Roman v. Abrams*, 822 F.2d 214, 226 (2d Cir. 1987) (deciding that remand by the Supreme Court did not disturb the precedent set by the portions of the remanded case that the Supreme Court did not reach).

> [There are] considerations [that] might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.
>
> Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. And in other statutes it has declared an intention not to alter it.
>
> . . .
>
> Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi*, *supra*, at 510. It has not yet done so.

523 U.S. at 756-59 (citations omitted).

The *Kiowa* Court highlighted the separate and independent natures of the doctrines of tribal immunity from taxation and other powers of the state, and tribal immunity from suit that controls the case at bar:

> We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. There is a difference between the right to demand compliance with state laws and the means available to enforce them.

Id. at 755. (citations omitted).

While the doctrine of tribal sovereign authority over land has "undergone considerable evolution [in the Supreme Court] in response to changed circumstances," *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973), the doctrine of tribal immunity from suit has not. The *Kiowa* Court indicated in the portion of the opinion set forth above that it looks to Congress for any such change.

In light of this history, we do not read *Sherrill* as implicitly abrogating the OIN's immunity from suit. No such statement of abrogation was made by the *Sherrill* Court, nor does the opinion call into question the *Kiowa* Court's approach, that any such abrogation should be left to Congress. *Sherrill* dealt with "the right to demand compliance with state laws." *Kiowa,* 523 U.S. at 755. It did not address "the means available to enforce" those laws. *Id.*

Appendix B

B. Application to the Case at Bar

We are left then with the rule stated in *Kiowa*: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. We therefore agree with the district court that the remedy of foreclosure is not available to the Counties unless and until Congress authorizes such suits or the OIN consents to such suits. Because neither of these events has occurred, the foreclosure actions are barred by the OIN's immunity from suit.

The Counties argue that the notion that they may tax but not foreclose is inconsistent and contradictory. To be sure, the result is reminiscent of words of the nursery rhyme:

> Mother, may I go out to swim?
>
> Yes, my darling daughter; Hang your clothes on a hickory limb, And don't go near the water.[7]

Or, as the Counties more soberly assert, such a rule "eviscerates" *Sherrill*, "making that essential right of government [to tax properties] meaningless." Appellants' Br. at 51.

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7. *Quoted in, e.g.*, Rose Cecil O'Neill, "The Hickory Limb" (1907), available at *www.gutenberg.org/files/28886/28886-8.txt* (last visited Mar. 19, 2010).

But a similar argument was rejected by the Supreme Court in *Potawatomi*.[8] There, the Court held that Oklahoma had the authority to tax certain cigarette sales made at the tribe's convenience store. *Potawatomi*, 498 U.S. at 512. The Court also ruled that the tribe's immunity from suit prevented the state from bringing suit to collect unpaid taxes. The Court reconciled these two rulings thus:

> Oklahoma complains that, in effect, decisions such as *Moe [v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976),] and *[Washington v. Confederated Tribes of] Colville [Reservation,* 447 U.S. 134 (1980), (authorizing taxation in certain circumstances)] give them a right without any remedy. There is no doubt that sovereign

8. The Counties argue that a right without a remedy is meaningless. Despite Chief Justice Marshall's eloquent statement that the government of the United States cannot be called a government of laws "if the laws furnish no remedy for the violation of a vested legal right," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803), our courts often conclude that there is no remedy to vindicate the violation of a right. Consider the doctrine of qualified immunity. In cases raising the issue of qualified immunity, a state actor may have violated the plaintiff's constitutional rights, but the court nevertheless decides that the actor is entitled to qualified immunity. *See, e.g.*, *Moore v. Andreno*, 505 F.3d 203 (2d Cir. 2007) (holding that plaintiff's Fourth Amendment rights were violated but that defendants were entitled to qualified immunity because that right was not clearly established). In these cases, there was a "violation of a vested legal right," but the "laws furnish no remedy." *Marbury*, 5 U.S. at 163.

> immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State . . . . States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

498 U.S. at 514 (citations omitted).

Individual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171 (1977) ("[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible."). They may therefore be enjoined from violations of state law. But if such enforcement mechanisms fail and if no agreement can be reached between the Counties and the OIN, the Counties' ultimate recourse will be to Congress, as we understand the Supreme Court to have instructed.

Because we affirm on the ground that the foreclosure actions are barred by the OIN's sovereign immunity from suit, we need not and do not reach the other three rationales relied upon by the district court.

Appendix B

III. Abstention

The Counties argue that the district court "erred as a matter of law in refusing to abstain from interfering with the Counties' tax foreclosure process." Appellants' Br. at 105. "We evaluate a district court's determination not to abstain . . . *de novo*, because it implicates the court's subject matter jurisdiction." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004). We agree with the district court, *see Madison County*, 401 F. Supp. 2d at 225, that abstention is not appropriate here.

The Counties' abstention argument appears to be based on 28 U.S.C. § 1341, which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." As the Counties note, though, in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the Supreme Court created an "exception to the general rule barring federal interference with state tax administration." Appellants' Br. at 106. The *Moe* Court concluded that Indian tribes should be permitted to bring federal lawsuits that the United States could have brought on a tribe's behalf as trustee — a principle that the Court found expressed in the legislative history of 28 U.S.C. § 1362, which provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The Court decided that

inasmuch as "the United States [was] not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, . . . the Tribe [was] not barred from doing so . . . ." *Moe*, 425 U.S. at 474-75 (citation omitted).

The Counties argue that this exception is inapplicable here because "*Sherrill* held that local government — and not OIN — has full sovereignty over the land at issue." Appellants' Br. at 106. But *Moe* does not depend on whether a tribe has sovereignty over any particular land. We perceive no reason why, because of *Sherrill* or otherwise, the holding of *Moe* should not apply to the case at bar. Accordingly, we decline to order the district court to abstain from exercising jurisdiction over this matter.

IV. Stockbridge's Motion to Intervene

Stockbridge appeals from the district court's denial of its motion to intervene in the *Oneida County* litigation as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).[9] We review the district court's denial of a Rule 24(a) motion for abuse of discretion. *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128 (2d Cir. 2001).

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9. Stockbridge does not appeal the district court's denial of its motion to intervene in the *Madison County* case. Stockbridge does, however, argue as amicus curiae, *see* Stockbridge Br. at 11 n.4 and 40 n.10, that it was an abuse of discretion for the district court to deny Madison County's motion to file a Rule 19 motion to dismiss for failure to join an indispensable party in that case. For the reasons set forth in the Rule 24 analysis, we conclude that Stockbridge is not an indispensable party to these actions, and that the district court therefore did not abuse its discretion in denying Madison County's Rule 19 motion to dismiss.

Appendix B

Rule 24(a)(2) states: "On timely motion, the [district] court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

> Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006).

Stockbridge sought to intervene for the sole purpose of seeking dismissal of this case insofar as it relates to the parcels of land that are allegedly part of the Stockbridge reservation. The ground for dismissal that Stockbridge proposed to assert was that "Stockbridge is a necessary and indispensable party which enjoys sovereign immunity from suit and cannot be forced to join this action. In its absence, the suit cannot proceed and must be dismissed as to all Oneida County lands situated within the 1788

Stockbridge treaty reservation." Stockbridge Mot. to Intervene at 2, *Oneida County*, dated November 25, 2005. In other words, Stockbridge asserts that it is a required party under Federal Rule of Civil Procedure 19(a)(1), but that joinder is not feasible as a result of Stockbridge's immunity from suit, and dismissal is therefore warranted under Rule 19(b) because Stockbridge is an indispensable party under that rule.

Rule 19(a), governing "Required Joinder of Parties," and Rule 24(a)(2), covering "Intervention of Right,"[10] under which Stockbridge asserts its claim here, "are intended to mirror each other." *MasterCard*, 471 F.3d at 390. Rule 19(a) requires parties to be joined if joinder is feasible and if the parties are necessary to "accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A), or if, under specified circumstances, disposing of the case without that party might "(i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest," Fed. R. Civ. P. 19(a)(1)(B).[11] "[I]f

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10. This subsection covers such intervention other than that provided for by federal statute, which is covered by subsection (a)(1) and is not at issue here.

11. Federal Rule of Civil Procedure 19(a)(1) reads in its entirety:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) ***Required Party***. A person who is subject to service of process and whose joinder will not deprive

(Cont'd)

a party is not 'necessary' under Rule 19(a), then it cannot satisfy the test for intervention as of right under Rule 24(a)(2)." *MasterCard*, 471 F.3d at 389.

Stockbridge argues that it is a necessary party under both Rule 19(a)(1)(B)(i) and (ii) because disposing of this matter in its absence might "as a practical matter impair or impede Stockbridge's ability to protect its interest" relating to the subject of the action, Stockbridge Br. at 8, and might also "leave the County subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations," *id.* at 48.[12] But under either theory, Stockbridge

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> the court of subject-matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> >
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > >
> > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Id. (emphasis in original).

12. Although Stockbridge includes this statutory language in its argument, it has failed to identify any possibility that a failure to join them would subject the existing parties to inconsistent obligations.

must first show that it "claims an interest relating to the subject of the action." Fed. R. of Civ. P. 19(a)(1)(B). As explained in *MasterCard*, 471 F.3d at 390, and discussed above, Rule 24 requires a similar showing if Stockbridge is to establish the ability to intervene as a matter of right.

The district court determined that Stockbridge lacked an interest in the instant litigation and therefore denied its motion to intervene. *Oneida County*, 432 F. Supp. 2d at 292. We agree.

> [F]or an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and legally protectable. An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.

Brennan, 260 F.3d at 129 (citations and internal quotation marks omitted). Stockbridge's purported interest in this case stems from the fact that it is currently involved in litigation in which it is asserting that a portion of the land at issue here is in fact part of the Stockbridge reservation. *See Stockbridge-Munsee v. State of New York*, No. 3:86-CV-1140 (N.D.N.Y. Oct. 15, 1986).[13] Stockbridge is therefore concerned that the present litigation could hinder its efforts to protect its property interest in that land.

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13. The OIN and both of the Counties are parties to that litigation.

The parties to this litigation do not, however, purport to put at issue the boundaries of the OIN's or Stockbridge's reservation. Nor, with the exception of the OIN's claims under state law, do the Tribe's arguments so much as touch on the issue of the continued existence of the reservation irrespective of its boundaries. We think that *Sherrill*'s rejection of the "unification theory," 544 U.S. at 214, under which the OIN argued that it had "unified fee and aboriginal title and may [therefore] assert sovereign dominion over the parcels," *id.* at 213, has taken the question of the reservation boundaries off the table for purposes of this appeal. What is relevant now is the OIN's assertion that it is immune from suit even if it does *not* have sovereign control over the land in question. The Counties' contrary assertion is that they can foreclose on land owned by the OIN *irrespective of* whether it is now or ever was part of the tribe's reservation. Stockbridge's interest in this litigation is therefore remote at best, because these assertions are unrelated to the question of reservation boundaries.[14]

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14. The *Madison County* district court did refer to "[t]he properties at issue" in the litigation being "located within the [Oneida] Nation's reservation." 401 F. Supp. 2d at 231. We hardly think that this sort of comment made by a district court — or an appellate court for that matter — in this case, where neither the issue nor a party claiming otherwise is before the court, is cause for a legitimate concern on the part of Stockbridge that its rights may be adversely affected in this litigation.

Finally, we note that the manner in which we decide this appeal also renders minimal the likelihood that Stockbridge will be prejudiced by its failure to be allowed to intervene.[15]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

JOSE A. CABRANES, *Circuit Judge*, with whom JUDGE *Peter W. Hall* joins, concurring:

The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.[16]

This rule of decision defies common sense. But absent action by our highest Court, or by Congress,

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15. In light of our conclusion, we need not reach the argument raised by the United States, as amicus curiae, that the appeal of the denial of the motion to intervene was not timely filed.

16. The Department of the Interior has agreed to accept roughly 13,000 of the tribe's 17,000 acres into trust. Department of the Interior, Record of Decision, May 20, 2008. Once the land is held in trust, it will no longer be subject to state and local taxation. 25 U.S.C. § 465. To be taken into trust, however, the tribe must pay all back taxes, penalties, and interest owed on the land before it will be taken into trust. 25 C.F.R. § 151.13. Accordingly, the practical effect on the Counties of our holding is limited to the 4,000 acres that will remain out of the trust.

it is the law. In the last twenty years, the Supreme Court has twice held that, although states may have a right to demand compliance with state laws by Indian tribes, they lack the legal means to enforce that right. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (holding that states have a right to collect taxes on certain cigarette sales on an Indian reservation, but the tribe is immune from suit seeking to enforce that right). In light of this unambiguous guidance from the Supreme Court, I am bound to concur with the conclusion that, although the Counties may tax the property at issue here, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), they may not foreclose on those properties because the tribe is immune from suit.

This result, however, is so anomalous that it calls out for the Supreme Court to reconsider *Kiowa* and *Potawatomi*. I wish that we were empowered to revisit those decisions, but, alas, that is not a privilege extended to intermediate appellate courts. If law and logic are to be reunited in this area of the law, it will have to be done by our highest Court, or by Congress.

Accordingly, I concur in the judgment of the Court and in the careful and comprehensive opinion of Judge Sack.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED JULY 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 01-7795, 01-7797

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff-Counter-Defendant-Appellee,

RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, RUTH BURR, BRIAN PATTERSON, and IVA RODGERS,

Consolidated-Defendants-Appellees,

-v.-

CITY OF SHERRILL, NEW YORK,

Defendant-Counter-Claimant-Appellant,

MADISON COUNTY,

Amicus Curiae-Appellant,

ONEIDA COUNTY,

Amicus Curiae,

Appendix C

STATE OF NEW YORK,

Amicus Curiae.

May 13, 2002, Argued
July 21, 2003, Decided

JUDGES: Before: VANGRAAFEILAND, MESKILL, and B. D. PARKER, JR., Circuit Judges.

OPINION BY: B. D. PARKER, JR.

OPINION

B. D. PARKER, JR., *Circuit Judge*:

This case, consisting of four actions, addresses whether properties reacquired by the Oneida Indian Nation of New York ("OIN" or "the Oneidas") are subject to taxation by the City of Sherrill, New York and Madison County, New York. The OIN is a federally recognized Indian tribe, governed by a Nation Representative and a Tribal Council.[1] The Oneidas lived on what became central New York State long before the founding of the United States. In the late eighteenth century most of the Oneidas' ancestral land was formally set aside by Congress as

1. Despite our use of the "OIN" acronym, the Oneida Indian Nation of New York should not be confused with the original Oneida Indian Nation, which is not a federally recognized tribe and is not a party to these consolidated cases. As discussed infra, the original Oneida Indian Nation became divided into three distinct bands, the New York Oneidas, the Wisconsin Oneidas, and the Canadian Oneidas, by the middle of the nineteenth century.

reservation land. During the nineteenth century much of it was sold to non-members of the tribe. But starting in the 1990s members of the tribe reacquired parcels in open-market transactions, and in 1997 and 1998 the purchases included several businesses and properties in Sherrill.[2] These properties include two upon which the Oneidas operate a gasoline station, a convenience store, and a textile manufacturing and distribution facility (the "Sherrill Properties" or the "properties"). Contending that these properties are within their reservation and are, consequently, not subject to taxation, the Oneidas refused to pay the property taxes or to collect sales taxes on merchandise sold at the businesses.

Following this refusal, Sherrill purchased three of the properties at tax sales and, two years later, recorded deeds. Sherrill also started formal eviction proceedings. In response, the Oneidas sued Sherrill in the United States District Court for the Northern District of New York (the "Lead case"), contending that the land, as part of their historic reservation recognized principally by the 1794 Treaty of Canandaigua, is exempt from state and municipal taxation. The suit sought declaratory and injunctive relief prohibiting the evictions and the imposition of property taxes. Although the Sherrill Properties were purchased from non-Oneidas, the Oneidas claim that their purchases reestablished the properties as reservation land because the federal government - which alone has the power to do so - has never changed the

2. Located in Oneida County, Sherrill is the State's smallest city, occupying one-and-one-half square miles with a population of approximately 3000 and an annual budget of $ 2.4 million.

reservation status of the land.[3] Sherrill counterclaimed, seeking declaratory and injunctive relief and damages, asserting that, for a variety of reasons, the land had lost its reservation status and that the OIN has been unjustly enriched by municipal benefits received, but not paid for, after reacquisition.

Sherrill also petitioned the New York State Supreme Court, Oneida County, to order the eviction of the OIN from the properties (the "Eviction case"). The OIN, citing federal preemption, removed to federal court, contending that sovereign immunity barred Sherrill's claims. In response to this defense, Sherrill filed an action against the individual members of the Tribal Council (the "Members case"). Sherrill again sought eviction and also sought injunctive relief, forbidding council members from purchasing additional properties in the city.

These three cases were related to an additional action (the "Related case"), brought by the OIN against Madison County, concerning thirteen parcels of land also purchased by the OIN in the 1990s. As in the Lead case, the Oneidas sought declaratory relief that these properties are not subject to taxation, contending that, notwithstanding intervening non-Indian possession, these properties have remained reservation land.

Procedural strife followed. In the Lead case, Sherrill moved for summary judgment, for injunctive relief, and to

3. It appears that the Sherrill Properties were transferred to an individual OIN member in 1805 and by that member to a non-Indian in 1807, and were thereafter owned by several private parties until their reacquisition.

amend its answer to add various affirmative defenses. The OIN opposed the motions and cross-moved for summary judgment in the Lead and Eviction cases, asserting principally that the parcels in question were non-taxable because they were located on reservation land in Indian country. *See* 18 U.S.C. § 1151. In the Members case, the OIN officers moved to stay or, in the alternative, to dismiss principally on grounds of sovereign immunity and the failure to name the OIN as a party. Madison moved to dismiss the Related case for failure to join two allegedly indispensable parties: the Wisconsin and Thames Oneidas. In November 2000, the State of New York, Madison and Oneida Counties, and a public company, Oneida Ltd., filed briefs as *amici curiae* in the Lead case in support of Sherrill's motion for summary judgment and in opposition to the OIN's cross-motion.

After the dust settled, the District Court issued a well-reasoned opinion resolving these various motions. *Oneida v. City of* Sherrill, 145 F. Supp. 2d 226 (N.D.N.Y. 2001) ("Oneida IV"). It considered a number of issues but devoted a good deal of attention to what the parties considered - and what we agree - to be the basic question posed: whether the properties are in Indian country. *Oneida IV*, 145 F. Supp. 2d at 241. The court concluded that, for a number of reasons, they are. The properties are part of the Oneidas' aboriginal lands and federally recognized reservation. The reservation's status was guaranteed by treaty obligations - principally in the 1794 Treaty of Canandaigua - and Sherrill did not carry its burden of demonstrating congressional action disestablishing the reservation. Accordingly, the District Court concluded that, as they are in Indian country, neither the Sherrill nor

Madison Properties are taxable by Sherrill and Madison County, and granted the OIN judgment on its claims in the Lead case. *Id.* at 254-259.

Determining that the OIN was entitled to sovereign immunity, the court also granted judgment on Sherrill's counterclaims in the Lead case and denied Sherrill leave to amend its complaint. *Id.* at 258-59. The court granted the OIN judgment in the Eviction case as well, concluding that it was entitled to sovereign immunity. It also granted the council members' motion to dismiss in the Members case, concluding that they too were entitled to sovereign immunity and that, in any event, Sherrill had failed to join the OIN, which the court found to be an indispensable party. Finally, the court *sua sponte* granted the OIN judgment on the pleadings in the Related case, concluding that its findings with respect to the Sherrill Properties applied also to those located in Madison. Separately, the court denied *Madison* County's motion to dismiss that case. *Oneida Indian Nation of N.Y. v. Madison County*, 145 F. Supp. 2d 268, 270-71 (N.D.N.Y. 2001). Sherrill and Madison appealed.[4] We agree with the District Court's

4. Sherrill appeals from the three separate judgments entered by the District Court on June 4, 2001, in the Lead, Eviction and Members Case, considered under docket number 01-7795. Madison appeals from the District Court's entry of judgment in the Related case, as well as the court's order denying its motion to dismiss, considered under docket number 01-7797.

On appeal, *Madison*, Oneida County, and the State of New York have appeared as *amici curiae* on the Lead, Eviction, and Members cases. They will be referred to collectively as the "*amici*."

principal conclusion that the OIN's Sherrill Properties are not taxable, and therefore affirm the judgment in the Lead, Eviction, and Members cases. Because we find, however, that the court's sua sponte grant of judgment on the pleadings in the Related case was procedurally improper, we vacate this judgment and remand for further proceedings.

BACKGROUND

I. Treaties Governing Rights to the OIN's Land

Since the land in question has been the subject of federal litigation off and on for more that one hundred and fifty years, before looking at the controlling legal issues, we briefly review how we reached this point in time. As previously noted, the parties contest whether land first occupied by the Oneidas in upstate New York before the founding of this country is, upon reacquisition by the Oneidas, subject to taxation by New York State and its municipalities.

The Oneidas are the direct descendants of members of the original Oneida Indian Nation, one of the six nations of the Iroquois Confederacy (the "Six Nations"), which were the most powerful Indian tribes in the northeastern United States at the time of the American Revolution. *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985) ("Oneida II") (citing B. Graymont, *The Iroquois in the American Revolution* (1972)). The Six Nations are the Cayugas, Mohawks, Oneidas, Onondagas, Senecas, and

Tuscaroras. *New York Indians*, 170 U.S. 1, 36, 42 L. Ed. 927, 18 S. Ct. 531, 33 Ct. Cl. 510 (1898) ("New York Indians II"). From time immemorial through the Revolutionary period, the Oneidas inhabited what is now central New York State. Their aboriginal lands covered approximately six million acres, from the Pennsylvania border to the St. Lawrence River, and from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. *Oneida II*, 470 U.S. at 230.

A. Nonintercourse Act and Canandaigua Treaty

With the adoption of the Constitution, Indian relations came exclusively under federal authority. *See Oneida II*, 470 U.S. at 234; *Oneida Indian Nation of N.Y. v. New York*,194 F. Supp. 2d 104, 146 (N.D.N.Y. 2002) (*Oneida IIIb*) ("Any rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution."). Article I, section 8, clause 3 of the Constitution, the Indian Commerce Clause, established Congress's power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3.

In 1790, Congress passed the first Indian Trade and Intercourse Act (the "Nonintercourse Act"), 1 Stat. 137, sharply limiting the alienability of Indian land. In essence, the Nonintercourse Act required federal consent for all land purchases from Indian nations. The 1793 amendments to the Act, which contain the language currently in effect, provided:

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> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Act of March 1, 1793, 1 Stat. 329 (1793) (codified at 25 U.S.C. § 177 (2000)); *see generally Mohegan Tribe v. Connecticut*, 638 F.2d 612, 616-18 (2d Cir. 1980) (discussing history of and amendments to Nonintercourse Act).

The Supreme Court has consistently applied the principle, embodied in the Nonintercourse Act, that federal consent is required for purchases of Indian land or for the termination of aboriginal title. *See, e.g., Oneida II*, 470 U.S. at 232; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 86 L. Ed. 260, 62 S. Ct. 248 (1941) ("Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.") (citing, among other authorities, *Johnson v. M'Intosh*, 21 U.S. 543, 8 Wheat. 543, 5 L. Ed. 681 (1823) (refusing to recognize land titles originating in grants by Indians to private parties in 1773 and 1775 because they were contrary to principle that Indian title could only be extinguished by or with consent of federal government)). The absence of federal consent is the Oneidas' central argument in this litigation.

Another pivotal enactment was the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794). This treaty

recognized that the Oneida reservation covered approximately 300,000 acres,[5] and the federal government undertook that it "[would] never claim [this land], nor disturb [the Oneidas] . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45. On the strength of this treaty, which remains in force, the Oneidas contend that the land in Madison and Sherrill is reservation land in Indian country and, upon reacquisition, must be treated as such.

B. Indian Removal and the Treaty of Buffalo Creek

Notwithstanding the Nonintercourse Act's prohibition on purchases of Indian land, and despite federal government advice to the contrary,[6] New York State

5. Prior to 1794, the Oneidas ceded substantial portions of their aboriginal lands to New York State. In 1785, by the Treaty of Fort Herkimer, the Oneidas ceded approximately 300,000 acres to New York State. *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1148 (2d Cir. 1988). In 1788, by the Treaty of Fort Schuyler, the Oneidas ceded approximately 5 million more acres to the State and retained 300,000 acres as a reservation. *Oneida II*, 470 U.S. at 231, *Oneida Indian*, 194 F. Supp. 2d at 112. The Sherrill Properties and, it appears, the Madison properties, were part of the territory reserved to the Oneidas. *Oneida IV*, 145 F. Supp. 2d at 234.

6. Colonel Timothy Pickering, the United States Secretary of War following the Treaty of Canandaigua, upon the recommendation of the United States Attorney General, ordered the Superintendent of the Affairs of the Six Nations not to aid New York in any purchases of Indian land and forwarded to New

repeatedly purchased Indian land within its borders. In a 1795 transaction, for instance, the OIN conveyed virtually all of its remaining land to New York in exchange for annual cash payments. *Oneida II*, 470 U.S. at 232. Overall, more than thirty treaties of purchase were made with various segments of the tribe during the late eighteenth and early nineteenth centuries. *See* Jack Campisi, *Oneida*, in *15 Handbook of North American Indians 484* (Bruce G. Trigger ed., 1978) (hereinafter "Campisi"). The Madison properties purportedly were conveyed to the State in this manner. As Oneida lands were transferred to the State, they were surveyed and laid out in townships, which eventually were subdivided and sold to private parties. Individual Oneidas also sold land to private parties. The Sherrill Properties fall into this group of conveyances. The Oneidas contend that to the extent any of the purchases lacked congressional approval, they violated the Nonintercourse Act and the Treaty of Canandaigua.

Early in the nineteenth century, federal policy concerning eastern Indians changed from maintenance of their right of occupancy in ancestral lands to their removal west of the Mississippi River. This change was spurred by the states' desire to control the remaining unceded Indian land within their boundaries, by the incursion of settlers onto treaty-protected Indian land, and by the perceived inability of the Indians to assimilate. *See* David

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York Governor George Clinton a copy of the Attorney General's opinion that title to the Six Nations' land could be extinguished only by a treaty entered into under authority of the United States. *See Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 494 (W.D.N.Y. 2002).

H. Getches *et al.*, *Cases and Materials on Federal Indian Law* 93-95 (4th ed. 1994) (hereinafter "Getches"); Felix S. Cohen, *Handbook of Federal Indian Law 53-54* (1942) (hereinafter "Cohen"). Removal was deemed necessary to "make available for white settlement a vast area and solving the problem of conflict of authority caused by a presence of Indian nations within state boundaries." Cohen at 53.

Between 1810 and 1816, the Six Nations, facing pressure from New York State to remove,[7] purchased approximately 500,000 acres in Wisconsin from the Menominee and Winnebago tribes.[8] *New York Indians II*,

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7. Ogden Land Company, which held preemption rights to Indian lands in New York State, wished to free the remaining reservation land in the State from Indian title. Eleazar Williams, an Epis *Id.* at 14, 36copal lay reader and catechist who had moved to the Oneida reservation, persuaded a large group of Oneidas and members of other tribes to emigrate and assisted in making the arrangements for their removal with the Wisconsin tribes. Francis Paul Prucha, *American Indian Treaties* 96, 202 (1997) (hereinafter "Prucha"); Campisi at 485. Williams' motive, however, differed from that of the State and Ogden; he sought the "establishment of an Iroquois ecclesiastical empire with himself as its leader . . . resettled in the vastness of Wisconsin." Campisi at 485.

8. The purchase was made on behalf of the Six Nations (excluding the Mohawks, who had withdrawn to Canada) and the St. Regis, Stockbridge, and Munsee tribes. The terms of this purchase and another made in 1822 were memorialized in a treaty between the federal government and the Menominee in 1831, to which the New York Indians gave their assent in 1832. *See New York Indians II*, 170 U.S. at 14; Treaty of Buffalo Creek, 7 Stat. 550, Preamble (1838) (proclaimed April 4, 1840).

170 U.S. at 11-14. Several hundred Oneidas moved there during the 1820s, with only a small number remaining in New York. *Id.* at 14, 36; *United States v. Boylan*, 265 F. 165, 167 (2d Cir. 1920); Campisi at 485. Those who stayed "held a single and undivided tract reserved out of the original Oneida reservation." *Boylan*, 265 F. at 167.

In 1830, Congress passed the Indian Removal Act, which reflected this shift in federal policy and allowed Indians to exchange their eastern lands for lands set aside in the west.[9] *See* Act of May 28, 1830, 4 Stat. 411. The Act provided:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west

9. The impetus for the Removal Act was a conflict between Georgia and its Cherokee Indian inhabitants. Georgia, desiring complete jurisdiction over the lands within its territory, had signed a compact with the federal government in 1802 by which the state relinquished its western lands (which ultimately became the states of Mississippi and Alabama) in return for a promise by the United States to extinguish Cherokee Indian title to Georgia lands "as early as the same can be peaceably obtained on reasonable terms." Prucha at 156. When the federal government failed to live up to its part of the bargain, Georgia itself denied the Indians' title and jurisdiction over the lands in question and considered the treaties it had signed with the Indians - which recognized Indian title and political autonomy - invalid. *Id.* at 157. These actions led to significant objections by the northern states. After heated debates in Congress concerning Indian rights, in particular the relative sanctity of their treaty-making power, the Indian Removal Act was passed, and the Cherokees' removal from Georgia was complete by 1838. *Id.* at 161-65.

> of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there . . . .

Ch. 148, 4 Stat. at 411-12

The 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), was enacted pursuant to this removal policy. Prucha at 202. Stimulated by the desire of Buffalo city leaders to "make room for the expansion of the city onto adjacent Seneca reservation lands," New York began a "full-scale drive . . . to eliminate the Indians from the state and move them to lands west of Missouri." *Id.* Under the Treaty, the Six Nations and the St. Regis Indians agreed to remove from their New York and Wisconsin reservation lands to approximately 1.8 million acres in Kansas, which had been set aside as Indian territory. The Treaty provided that the new reservation lands were to provide "a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." Buffalo Creek Treaty, art. 2. The Treaty authorized a payment of $ 400,000 to cover the costs of removal. As discussed below, Sherrill and Madison claim that it effected the disestablishment of the Oneidas' reservation and the formal relinquishment, with congressional approval, of their possessory claim to the lands at issue.

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The first eight articles and Article 15 of the Treaty set forth this basic bargain. *Id.*, arts. 1-8, 15. Articles 9 through 14 reflect specific agreements between the government and individual tribes. *Id.*, arts. 9-14. In Article 10, for example, the Senecas agreed to remove within five years to land in eastern Kansas, and the government approved the sale of their remaining New York land to two individuals, Thomas L. Ogden of the Ogden Land Company and Joseph Fellows. *Id.*, art. 10; *see New York Indians*, 72 U.S. (5 Wall.) 761, 767, 18 L. Ed. 708 (1867) ("New York Indians I"). The Tuscaroras made a similar removal commitment in Article 14, which also confirmed the sale of their New York land to Ogden and Fellows. Buffalo Creek Treaty, art. 14.

At the time of the Treaty, only approximately 5000 of the original 300,000 acres of Oneida reservation land remained in their hands, the rest having been sold to New York or to private parties. Around 620 Oneidas still resided in New York. Buffalo Creek Treaty, Sch. A, Add. 29. Article 13 of the Treaty provided for the removal of these Oneidas, but only upon certain conditions:

> The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can

> make satisfactory arrangements with the Government of the State of New York for the purchase of their lands at Oneida.

Buffalo Creek Treaty, art. 13 (emphasis added).

The wholesale removal of the New York Indians to Kansas contemplated by the Treaty never occurred. *See New York Indians II*, 170 U.S. at 26-27 (noting that provision was only made for the "actual removal of more than about 260 individuals of the claimant tribes," and that none of the thirty two Indians who actually received Kansas allotments ever settled permanently there). For their part, the Oneidas residing in New York and Wisconsin refused to relocate to Kansas. *See New York Indians II*, 170 U.S. at 9-10. Hundreds of New York Oneidas moved instead to Wisconsin and to Ontario, Canada. By 1848 only approximately 200 Oneidas resided in New York. Campisi at 485. Thus, by the middle of the nineteenth century, three distinct bands of the tribe existed: the New York Oneidas, the Wisconsin Oneidas, and the Canadian ("Thames") Oneidas. *Oneida IV*, 145 F. Supp. 2d at 235.

The record does not reflect any large block sales of reservation land to New York State by the Oneidas after 1842, when 1100 acres were conveyed. But as the exodus of members continued over the next half-century, reservation acreage inhabited by Oneidas shrank significantly, by some accounts to less than 100 acres. *See Boylan*, 265 F. at 165 (discussing action brought by federal government, on behalf of Oneidas, seeking ejectment of defendants from thirty-two acres of land, forming part of original Oneida

reservation); Annual Report, Commissioner of Indian Affairs, 1890, 1893 (stating that the Oneida reservation contained only approximately 350 acres in 1890, and approximately 100 acres in 1893 when the tribe's New York branch itself numbered less than 200).

II. Land Claims Involving the OIN

Litigation involving the OIN and other New York Indians followed the Treaty of Buffalo Creek. Ogden and Fellows, who held fee title to Seneca lands under the Treaty, sued New York to void pre-removal tax assessments after the parcels had been sold to third parties because of the Senecas' nonpayment of state taxes. *New York Indians I*, 72 U.S. at 764-65. In 1867, the Supreme Court held that the taxation of the parcels was "premature and illegal" because it interfered with the Indians' possessory rights guaranteed by the federal government. "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possession, and are in under their original rights, and entitled to the undisturbed enjoyment of them." *Id.* at 770.

As noted, most of the Six Nations Indians did not remove to Kansas. The federal government disposed of the Wisconsin lands conveyed to it by the Indians, appropriated the unoccupied Kansas land and placed it in the public domain for sale to settlers. *New York Indians II*, 170 U.S. at 4, 24. The New York Indians sued, claiming entitlement to the Kansas lands ceded to them under the Treaty, and seeking the value of the land sold and

the money the government had agreed to pay on their removal. *Id.* at 1-2.

Eventually the case reached the Supreme Court, which held in l898 that the Buffalo Creek Treaty effected a present grant of the Kansas lands to the Indians and that forfeiture of these lands could occur only through legislative action. Simply opening the land to settlement, as the federal government had done, was insufficient. Accordingly, the Court concluded that the New York Indians, including the Oneidas, were entitled to money damages. *Id.* at 25-36.

Litigation involving the Oneidas' proprietary rights in their New York reservation lands began in the late nineteenth century. In 1885, some Oneidas conveyed reservation parcels to non-Indians but continued to live on the land. After the Indian occupants failed to meet mortgage obligations, the owner brought a foreclosure action and, following partition, the Indians were ejected. Reaffirming the principles embodied in the Nonintercourse Act, we held the ejectment improper because the original conveyance lacked the approval of the federal government: the "tribe could not sell, nor the individual members, for they have not an undivided interest in the tribal lands, nor alienable interest in any particular tract." *Boylan*, 265 F. at 174. We emphasized that "[a] transfer of the allotment to [non-Indians] is not simply a violation of the proprietary rights of the Indians; it violates the government rights of the United States." *Id.* at 173.

Many decades later, in 1970, the Oneidas sued Oneida and *Madison* Counties as a consequence of their occupation of an approximately 900-acre tract ceded by the OIN to New York in 1795. The Oneidas claimed that the occupation violated the Nonintercourse Act and sought to recover the land's fair rental value for a two-year period in the 1960s. The case reached the Supreme Court, which again affirmed the Oneidas' aboriginal possessory rights, concluding that the Noninterourse Act and certain treaty obligations prohibited termination of these rights without federal approval. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 671, 675-78, 39 L. Ed. 2d 73, 94 S. Ct. 772 ("Oneida I") (stating that the Oneidas had asserted "the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession").

On remand, the district court found the counties liable to the Oneidas, and we affirmed. *Oneida Indian Nation of N.Y. v. County of Oneida*, 719 F.2d 525 (2d Cir. 1983). Hearing the case for a second time, the Supreme Court again affirmed, holding that the Oneidas could maintain a federal common law action based on the counties' allegedly illegal occupation of their lands and that the Nonintercourse Act did not preempt the tribe's claims. *Oneida II*, 470 U.S. at 236-40. The watershed decisions in *Oneida I* and *Oneida II* established the OIN's right to challenge the deprivation of its historic title by the sales

to New York in the late eighteenth and early nineteenth centuries.[10]

In 1974, the OIN and the Wisconsin Oneidas brought a similar suit against Oneida and Madison Counties, but of considerably greater scope. The Oneidas alleged that between 1795 and 1846, pursuant to some thirty agreements, New York State illegally acquired approximately 250,000 acres of Oneida reservation land in violation of the Nonintercourse Act. *See Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 199 F.R.D. 61, 66 & n.3 (N.D.N.Y. 2000) ("*Oneida IIIa*"). The case was inactive during the pendency of *Oneida I* and *II*. In 1998, the United States intervened and joined the Oneidas in moving to add as defendants approximately 20,000 private landowners whom the Oneidas claimed were either liable for money damages or should be ejected. In September 2000, the district court concluded, following *Oneida II*, that the Oneidas could sue state entities for damages based on the illegal occupation of their historic reservation land but that ejectment and money damages from the individual landowners was not available, and the court declined to permit their joinder. *See Oneida Indian*, 199 F.R.D. at 79-94.

In 1978 and 1979, the Oneidas also challenged New York State's purchases of their aboriginal lands in 1785

10. The damages phase of this case has just recently concluded, more than thirty years after the case commenced, with the Oneidas receiving approximately $ 35,000 plus prejudgment interest from Oneida and Madison Counties. *See Oneida Indian Nation of N.Y. v. County of Oneida*, N.Y., 217 F. Supp. 2d 292 (N.D.N.Y. 2002).

and 1788, under the Treaties of Fort Herkimer and Fort Schuyler, as violations of the Articles of Confederation, the Treaty of Fort Stanwix, and the 1783 Proclamation. We concluded, however, that the State had the right to make such purchases during the confederal period and dismissed the action. *See Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir. 1988).

The next major litigation to reach our court was this group of consolidated cases where, as we have seen, the District Court granted summary judgment to the OIN, determining that the Sherrill and Madison Properties remained reservation land immune from local taxation.

DISCUSSION

We review the grant of a motion to dismiss or a motion for summary judgment de novo, drawing all reasonable inferences in favor of the nonmoving party. *See Chambers v. Time Warner*, 282 F.3d 147, 152 (2d Cir. 2002); *Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir. 1998). In reviewing a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), we accept as true all material facts alleged in the complaint. Chambers, 282 F.3d at 152. "Dismissal is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Id.* (citation and internal quotation marks omitted). We apply this same standard in reviewing a grant of judgment on the pleadings pursuant to Rule 12(c). *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

I. Basic Principles

Three basic principles inform the disposition of this action. The first is the Indians' right of occupancy on tribal land, or "Indian country," which "may extend from generation to generation, and will cease only by dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption." *New York Indians I*, 72 U.S. at 771. The second, embodied by the Nonintercourse Act, is federal preeminence over the disposition of land in Indian country. Since "Congress alone has the right to say when the [United States'] guardianship over the Indians may cease," *Boylan*, 265 F. at 171, the sale or conveyance of reservation land can only be made with congressional sanction, that is, "by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2000). The third is federal preemption, which prohibits states from imposing property taxes upon Indian reservation land without congressional approval. *New York Indians I*, 72 U.S. at 771; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."); *cf. Boylan*, 265 F. at 170.

There is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of

Canandaigua. Sherrill contends, however, that because the properties are no longer within Indian country and the Oneidas no longer exist as a tribe, they are subject to taxation. We first address these contentions and then turn to the District Court's procedural rulings.

II. Indian Country

In general, "Indian country" refers to the geographic area in which tribal and federal laws normally apply and state laws do not. Section 1151 of Title 18 of the United States Code, defining "Indian country," provides:

> The term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000).[11]

11. Although § 1151 is a criminal statute, it "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 428 n.2, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975). It codified the Act of June 25, 1948, 62 Stat. 757,

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Dependent Indian communities encompass any "area . . . validly set apart for the use of the Indians as such, under the superintendence of the Government." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991). Indian allotments are those parcels allocated to tribes, as opposed to those opened to settlers, under federal policies designed to accommodate the westward movement of settlers and to promote the integration of Indians into the wider society. *See generally Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106-07, 141 L. Ed. 2d 90, 118 S. Ct. 1904 (1998) (discussing federal allotment policy). Under § 1151, "once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership." Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 513 (1976).

As noted, land in Indian country, including reservation land, is not subject to state taxation absent express

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which was passed to correct jurisdictional conflicts arising from allotment policy and the subsequent restoration of surplus lands to tribal ownership in the Indian Reorganization Act. *Hagen v. Utah*, 510 U.S. 399, 425, 127 L. Ed. 2d 252, 114 S. Ct. 958 (1994) (Blackmun, J., dissenting). Its practical effect "was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 124 L. Ed. 2d 30, 113 S. Ct. 1985 (1993) (quotation omitted).

congressional authorization. "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. Georgia*, 31 U.S. 515, 557, 8 L. Ed. 483 (1832); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765, 85 L. Ed. 2d 753, 105 S. Ct. 2399 (1985) ("The Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear."); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 173-81, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973).

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 89 L. Ed. 1367, 65 S. Ct. 989 (1945). It traces from the "doctrine of discovery," the law of Indian land tenure which the Supreme Court developed in the early nineteenth century to reflect European policy toward the Indians and to explain Indian sovereignty relative to colonial authority. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-74, 5 L. Ed. 681 (1823). The doctrine provided that the "discovering" European nations (and later the United States) held fee title to Indian aboriginal lands, subject to the Indians' right of occupancy and use. *Oneida II*, 470 U.S. at 234. As a result, no one could purchase Indian land or otherwise terminate aboriginal title without the consent

of the discovering nation's sovereign. *Id.* As Chief Justice Marshall explained in *Johnson v. McIntosh*:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Johnson v. M'Intosh, 21 U.S. 543, 8 Wheat. 543, 574, 5 L. Ed. 681.

Generally speaking, nineteenth and twentieth century federal policy was consistent with this approach to Indian sovereignty, despite a notably inconsistent vision of the Indians' relationship to non-Indian citizens. While the tribes exercise inherent sovereign authority over their members and land located within state boundaries, they are nevertheless "domestic dependent nations" under federal protection. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 8 L. Ed. 25 (1831); *see also Boylan*, 265 F. at 172. The land they occupy is owned by the United States, which has retained the authority to regulate conveyances. As

we have observed, "while the states have a right to make treaties with the Indians, [they] cannot interfere with the rights and obligations of the federal government." *Boylan*, 265 F. at 173. Although Indians' dependent status prohibits domestic and international political recognition, "it does assure them self-government, free of most state law strictures, over their territory and members, and, to a more limited extent, over non-Indians." Getches at 373-74; *see Boylan*, 265 F. at 174.

This "platonic notion[] of sovereignty," embodied in the so-called "Indian sovereignty doctrine," historically gave state law "no role to play" within a tribe's territorial boundaries. *McClanahan*, 411 U.S. 164, 168, 172, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). While courts have moved towards reliance on firmer, more textually based concepts such as federal preemption to definitively resolve the rights of Indian tribes vis-a-vis the states, *see id.*, the Indian sovereignty doctrine remains relevant because it provides a backdrop against which the applicable treaties and federal statutes must be read.

A. Set Aside and Superintendence

Sherrill contends that, even accepting the proposition that the properties are located within the Oneida reservation's historic boundaries, the parcels are taxable because they are not currently located within Indian country. Principally relying on *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 140 L. Ed. 2d 30, 118 S. Ct. 948 (1998), Sherrill asserts that the properties are not in Indian country because they were neither set

aside by the federal government for Indian use nor placed under federal superintendence. Rather, the properties were acquired in private, open-market transactions and receive services from Sherrill, not the federal government.

In Alaska, the Supreme Court considered whether certain nonreservation land owned by members of the Venetie tribe in fee simple was located in Indian country. *Id.* at 527. The land had been part of the Neets'aii Gwich'in reservation, which had been disestablished pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. Title was then conveyed to the Venetie native corporations as tenants in common, which in turn transferred title to the tribe. *Id.* at 524. Because the reservation had been disestablished, and because no allotments were involved, "whether the Tribe's land is Indian country depended on whether it fell[] within the 'dependent Indian communities' prong of the statute, § 1151(b)." *Id.* at 527. The Court concluded that the land was not Indian country because it neither had been "set aside by the Federal Government for the use of the Indians as Indian land" nor was "under federal superintendence" - two requirements, the Court found, that applied equally to reservations, dependencies, and allotments. *Id.* at 527, 532-34.

Sherrill argues that because the OIN, like the Venetie, purchased the properties in fee and can freely alienate them, the land cannot be in Indian country. We disagree. While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land,

which by its nature was set aside by Congress for Indian use under federal supervision. *See United States v. John*, 437 U.S. 634, 638-47, 57 L. Ed. 2d 489, 98 S. Ct. 2541 (1978) (holding that tribe's fee simple parcels on historic reservation were under federal control despite the fact that federal supervision of the tribe had not been continuous*); cf. Donnelly v. United States*, 228 U.S. 243, 269, 57 L. Ed. 820, 33 S. Ct. 449 (1913) (holding that reservation land is Indian country).[12]

Because the Sherrill Properties are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua, they satisfy the set aside and superintendence requirements of 18 U.S.C. § 1151.[13] Moreover, just as Alaska concluded that the "mere

12. The Alaska Court itself noted that it "had also held, not surprisingly, that Indian reservations were Indian country." 522 U.S. at 528 n.3; *see also id.* at 528-30 (discussing cases where the Court had found "that Indian lands that were not reservations could be Indian country" (emphasis added)).

13. Sherrill's argument that the Oneidas' land does not meet federal set aside requirements because it was originally allocated to the Indians by New York State, rather than the United States, is incorrect. The 300,000 acres were a carve-out from the 1788 Treaty of Fort Schuyler, and represented that portion of the Indians' aboriginal homeland that had not been conveyed to New York and thus never became state land. *Oneida II*, 470 U.S. at 231, *Oneida Indian*, 194 F. Supp. 2d at 139 (noting that Article 2 of the treaty "specifically states that the Oneidas 'hold to themselves and their posterity forever' the 'reserved lands'"); *id.* at 140 (concluding that "the Treaty of Fort Schuyler cannot reasonably be understood to have divested the Oneidas of their aboriginal title"). After the federal government assumed complete control over Indian affairs

provision" of federal services on the tribe's property did not make it Indian country, the provision of certain state services to the Oneidas by Sherrill does not eliminate that status. *See* Alaska, 522 U.S. at 534.

B. Alienability

Alternatively, Sherrill argues that the properties are not in Indian country because they are freely alienable. Relying on *Cass County*, Sherrill contends that the reacquisition of freely alienable, former reservation land by an Indian tribe "does not cause the land to resume tax-exempt status . . . unless and until [it is] restored to federal trust protection under [25 U.S.C. § 465]."[14] Sherrill Br. at 35 (quoting *Cass County*, 524 U.S. at 115). *Cass County*, however, offers Sherrill little help. There, Congress explicitly had made land in Indian country freely alienable by providing for the "complete cession and relinquishment" of all tribal title in Minnesota. *Cass County*, 524 U.S. at 108. Afterwards, the land had been subject to federal allotment and sold to non-Indians.

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with the ratification of the Constitution, the Canandaigua Treaty recognized the Oneidas' 300,000-acre reservation in federal terms, stating that it "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. 45.

14. Section 465 of the 1934 Indian Reorganization Act allowed some of the land alienated under allotment to return to Indian hands. The section "grants the Secretary of the Interior authority to place land in trust, to be held by the federal government for the benefit of the Indians and to be exempt from state and local taxation after assuming such status." *Cass County*, 524 U.S. at 114.

Because "alienability equals taxability," the Court found the land in question to be taxable. *Id.* at 109, 113 (citing *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 116 L. Ed. 2d 687, 112 S. Ct. 683 (1992); *Goudy v. Meath*, 203 U.S. 146, 51 L. Ed. 130, 27 S. Ct. 48 (1906)). In contrast, the Sherrill Properties are located on reservation land, a status which Congress has never changed. Since Congress has not done so, the properties did not become freely alienable and taxable simply because the OIN purchased them on the open market and currently holds them in fee simple. *See Solem v. Bartlett*, 465 U.S. 463, 471, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). State and local governments may not tax reservation land "absent cession of jurisdiction or other federal statutes permitting it." *County of Yakima*, 502 U.S. at 258. Sherrill can point to neither.

Sherrill is troubled by the seeming "impossibility" that the Oneidas' free-market purchase of land within their ancient ancestral homeland could instantly render the parcels free from taxation and by the potential hardship to local municipalities and residents resulting from the Oneidas' "recreation" of "a tribal homeland." Sherrill Br. at 37. It suggests that this result is inconsistent with the conclusion of other courts that, even when a reservation has not been disestablished, Indians who no longer own parcels on the reservation cannot base claims to possessory rights on the Nonintercourse Act. *Id.* at 32-

34 (citing *Oneida IIIa*; *Cayuga Indian Nation v. Cuomo*, 1999 U.S. Dist. LEXIS 10579, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999)).

But there is no inconsistency. The authorities Sherrill points to address the judicial remedies available for interference with the possessory rights of Indian plaintiffs, not the existence of those rights. In *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357-59, 71 L. Ed. 294, 47 S. Ct. 142, 63 Ct. Cl. 671 (1926), for example, the Supreme Court held that the proper remedy for the wrongful taking of Indian land that was subsequently settled and developed was monetary damages rather than repossession by the tribe. This principle became known as the "impossibility" doctrine because it was based on the impracticability of uprooting current property owners where Indians held a valid possessory claim to land on which others had settled.

Our case is different. Recognizing the Oneidas' possessory rights in their historic reservation land, and the accompanying exemption from state taxation, does not require uprooting current property owners, because the Oneidas currently own the properties in question. Consequently, the threat from eviction present in *Oneida IIIa* and *Cayuga* is not present here. And Sherrill's argument that the removal of property from local tax rolls is a "hardship" that "upsets settled expectations" only begs the question whether the city is authorized to tax the properties.

The critical dichotomy, which Sherrill does not acknowledge, is between historic Indian title and fee

ownership of the land itself. Indian or aboriginal title is the right of a tribe to use and occupy lands it has inhabited from time immemorial. *See Oneida II*, 470 U.S. at 234. When a reservation has been disestablished, as in *Alaska* or *Cass County*, Indian title is extinguished and the only pertinent inquiry for ownership purposes is fee title. But when Indian land has been alienated in ways inconsistent with federal law, Indian title remains with the tribe. The Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes. But when the tribe holding Indian title reacquires former reservation land, both forms of title coexist. *Cf. United States v. Sandoval*, 231 U.S. 28, 48, 58 L. Ed. 107, 34 S. Ct. 1 (1913) (rejecting position that Indian lands held in fee simple by Pueblo cannot be Indian country). The Indian-country status of the land therefore becomes fully relevant: the state cannot tax it and the tribe can no longer legally alienate it, at least without federal approval.

At first glance, this "coexistence" of titles appears uneasy, because the validity of the Oneidas' Indian title depends on a finding that the properties were alienated in violation of the Nonintercourse Act. And if this is so, then the chain of fee simple title, of which the Oneidas are now part, is invalid. This unease is ultimately unwarranted, however, because the OIN's possessory rights are grounded in its unextinguished Indian title, just as they were prior to the 1805 conveyance. Acquisition of the properties, as the tribe asserts, was the least disruptive means of effectuating these possessory rights. Because the previous fee owners relinquished any claims to the land, the OIN's rights may be fully realized. Accordingly,

we conclude that the OIN's purchase of the Sherrill Properties in fee simple neither rendered them freely alienable nor deprived them of their Indian-country status.

III. Effect of the Buffalo Creek Treaty on Oneida's Property Rights

Both of Sherrill's arguments for why the properties are not in Indian country rest on the claim that the land is no longer in an Indian reservation. This claim is grounded in the 1838 Buffalo Creek Treaty which, Sherrill and the *amici* contend, formally disestablished the Oneida reservation. Again, we disagree. Before returning to the text of this treaty, it is helpful to note certain basic canons of Indian treaty construction.

A. Canons of Indian Treaty Construction

Treaties are generally more closely linked to the historical events surrounding their negotiation and passage than are private agreements. They are, accordingly, "construed more liberally . . ., and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 87 L. Ed. 877, 63 S. Ct. 672, 97 Ct. Cl. 731 (1943). This is particularly true with regard to Indian treaties. "'The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians [with respect to tribal lands],' and the Indians' unequal bargaining power when agreements

were negotiated." *Hagen*, 510 U.S. at 423 n.1 (Blackmun, J. dissenting) (quoting *Oneida II*, 470 U.S. at 247). This relationship, and the notions of Indian sovereignty and self-government embodied in it, "provide[] an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980) (quoting *McClanahan*, 411 U.S. at 172 (1973)).

It is, moreover, "well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Oneida II*, 470 U.S. at 247 (citations omitted). Any finding that Congress has abrogated Indian treaty rights is inappropriate "absent explicit statutory language." *Oneida II*, 470 U.S. at 247 (citation and internal quotation marks omitted); *cf. Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 87 L. Ed. 2d 542, 105 S. Ct. 3420 (1985). Congress's intention in that regard, in other words, must be "clearly expressed."[15] *Hagen*, 510 U.S. at 423 & n.1 (Blackmun J., dissenting).

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15. This canon has been applied on numerous occasions to exempt tribes from state taxation. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 392-93, 48 L. Ed. 2d 710, 96 S. Ct. 2102 (1976); *McClanahan*, 411 U.S. at 174-75 (1973); *Squire v. Capoeman*, 351 U.S. 1, 6-8, 100 L. Ed. 883, 76 S. Ct. 611 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67, 74 L. Ed. 478, 50 S. Ct. 121 (1930); *Choate v. Trapp*, 224 U.S. 665, 675-79, 56 L. Ed. 941, 32 S. Ct. 565 (1912); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760, 18 L. Ed. 667 (1867).

B. Disestablishment and Diminishment Generally

The Supreme Court applied and elaborated these canons in considering issues of reservation disestablishment and diminishment most recently in the "surplus land act" cases.[16] These cases dealt with land claims arising from the allotment era and specifically addressed whether certain unallotted lands opened for settlement to non-Indians remained in Indian country. *Solem v. Bartlett*, 465 U.S. 463, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984), for example, involved a writ of habeas corpus sought by a non-Indian who had been tried and convicted in state court for a crime committed on a Sioux reservation. The question presented was whether the state had jurisdiction over the petitioner by virtue of the Cheyenne River Act, which had authorized the Interior Secretary to allot a portion of the reservation to homesteaders. In concluding that the reservation had not been diminished, the Court set forth the standard for identifying the "clear" expressions of congressional intent needed to find diminishment. It began by noting that

> only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status

16. Beginning in the late-nineteenth century, Congress passed a series so-called "surplus land acts," forcing Indians onto individual allotments carved out of reservations and opening unalloted lands to non-Indian settlers.

> until Congress explicitly indicates otherwise . . . . Congress [must] clearly evince an intent to change boundaries.

Id. at 470 (emphasis added) (citations and internal quotation marks omitted).

Although "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests" can be helpfully probative, particularly when buttressed by fixed compensation for the opened lands, *id.*, this language is not a prerequisite for a finding of diminishment. Rather, an act's legislative history and the subsequent treatment of the land (including settlement patterns), may also suffice:

> When events surrounding the passage . . . - particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress -- unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged. To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher

> Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unalloted open lands. On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. In addition to the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471-72 (citations omitted); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 139 L. Ed. 2d 773, 118 S. Ct. 789 (1998) (stating that the Court may consider "'the historical context surrounding the passage of the surplus land Acts,' and to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there" (quoting *Hagen*, 510 U.S. at 411)).

But when these elements, considered in their totality, "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. The same analysis applies to the termination or disestablishment of a reservation. *See DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975) ("[The Supreme Court] does not lightly conclude that an Indian reservation has been terminated . . . . 'The Court requires that the congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" (quoting *Mattz v. Arnett*, 412 U.S. 481, 505, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1973)).

Applying these principles, the Supreme Court has found language supporting diminishment in cases where the operative portion of a surplus land act reflects an Indian agreement to "cede, sell, relinquish and convey" opened lands. *See, e.g., Yankton*, 522 U.S. at 344; *DeCoteau*, 420 U.S. at 439, 441 n.22; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 591, 51 L. Ed. 2d 660, 97 S. Ct. 1361 & n.8, 430 U.S. 584, 51 L. Ed. 2d 660, 97 S. Ct. 1361 (1977). Similarly, in *Hagen v. Utah*, the operative language provided that "all the unallotted lands within said reservation shall be restored to the public domain," 510 U.S. at 412 (emphasis added), which the Court found indicated a congressional intent to diminish. *Id.* at 414.

In each of these cases, the Supreme Court found a textually grounded intention to diminish supported by legislative history. To varying degrees the Court also found other support such as contemporaneous congressional and administrative statements, proclamations opening the reservation to settlement, the state's assumption of jurisdiction over the opened lands, and the subsequent pattern of settlement. *See Yankton*, 522 U.S. at 351-57; *Hagen*, 510 U.S. at 416-21; *DeCoteau*, 420 U.S. at 437-49; *Rosebud*, 430 U.S. at 592-615.

C. The Buffalo Creek Treaty

As we have seen, Articles 1 and 2 of the Buffalo Creek Treaty summarize the central bargain between the New York Indians and the federal government: the cession of the New York Indians' Wisconsin lands in exchange for reservation land in Kansas. Most of the remainder of the Treaty addresses the Kansas tract and various other tribe-specific arrangements. Articles 10 and 14 contain explicit cession language for the New York territory of two tribes, the Senecas and Tuscaroras. Buffalo Creek Treaty, arts. 10, 14; *see New York Indians II*, 170 U.S. at 21 (stating that the Senecas' and Tuscaroras' agreements "indicated an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas"). In contrast, Article 13, which addresses the Oneidas, contains no such language:

Appendix C

> The United States will pay [certain sums to certain Oneidas] . . . for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida.

Buffalo Creek Treaty, art. 13 (emphases added).

Nothing in its text provides "substantial and compelling" evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation.[17] There is no specific cession language, and no fixed-sum payment for opened land in New York; rather there is only the possibility of a sale for "uncertain future proceeds." *DeCoteau*, 420 U.S. at 448 (describing arrangement in *Mattz*, 412 U.S. 481, 37 L. Ed. 2d 92, 93 S. Ct. 2245). Article 13 at best is ambiguous about whether removal to Kansas was required. More properly, it reflects a

17. Sherrill and the State rely upon Article 2 of the Treaty, asserting that the Oneidas agreed to the Kansas tract "as a permanent home for all the New York Indians, now residing in the State of New York." Buffalo Creek Treaty, Art. 2 (emphasis added). This provision, however, applies only to those Indians "who have no permanent homes." It is therefore not applicable to the OIN, who had a permanent residence in New York State. Even if it were applicable, the article does no more than Article 13 in revealing an intent by Congress or the Oneidas to disestablish their reservation in New York.

simple agreement to agree. While the Oneidas agreed to remove, removal was conditioned on speculative future arrangements between the Indians and a third party, New York's governor. *See New York Indians II*, 170 U.S. at 28 ("It . . . appears, from the eleventh, twelfth, and thirteenth findings [of the Treaty], that the President never fixed any time for [the Indians'] removal, as was contemplated in the third article.") This contingency is reflected by the comments of Ransom Gillet, a federal Indian commissioner who participated in the Treaty negotiations and whose declaration is appended to the final document. Gillet stated that, in obtaining the Oneidas' consent to the treaty, he "most solemnly assured them that the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York . . . . The treaty gives them lands if they go to them and settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York and then emigrate. But they will not be compelled to sell or remove."[18] Statement of Ransom

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18. Contrary to the contention of Sherrill and New York State, consideration of the Gillet declaration here is proper. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 143 L. Ed. 2d 270, 119 S. Ct. 1187 (1999). Senate amendments to the Buffalo Creek Treaty in June 1838 required a federal commissioner to explain its meaning to the tribes before it could take effect. Following Gillet's declaration to the Oneidas, the tribe assented to the treaty, and this assent - which refers to Gillet's declaration and includes his affirmation that the assent was voluntary - appear as addenda to the document as ratified. *See New York Indians II*, 170 U.S. at 24 ("[A] written declaration annexed to a treaty at the time of its ratification was as obligatory as if the provision had been inserted in the body of the treaty itself.") (citing *Doe v. Braden*, 57 U.S. (16 How.) 635, 656, 14 L. Ed. 1090 (1853)).

H. Gillet at Oneida Castle, Aug. 9, 1838 (emphasis added); *see also* Report of the Committee of Indian Affairs, State of New York, Mar. 24, 1847, at 4 (transcribing statement by a federal Indian commissioner to the Six Nations that they were not obligated to remove west). As it turned out, the sales to New York State were never accomplished, and the planned removal never took place. *Oneida IIIb*, 194 F. Supp. 2d at 142.

Article 3 of the Treaty, moreover, contemplates that some tribes might not remove from their New York lands:

> Such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

Buffalo Creek Treaty, art. 3 (emphasis added); *see New York Indians II*, 170 U.S. at 28. Accordingly, the Treaty's text contains neither an obligation to remove nor any indication of a congressional intention to disestablish the Oneidas' New York reservation.

Sherrill and the *amici* nonetheless observe that certain legislative and administrative documents, such as "representative" reports of the Commissioner of Bureau of Indian Affairs spanning the period 1890 to 1997 and a 1981 Senate Report preceding the passage of New

York's Indian jurisdictional statute, 25 U.S.C. § 233,[19] demonstrate that the Oneidas no longer have a New York reservation. While congressional and administrative references to the reservation may bear some general relevance to congressional intent, *see Yankton*, 522 U.S. at 351, the references cited by Sherrill, the earliest of which was decided a half-century after the Treaty's proclamation, indicate little if anything about Congress's intent in 1838. Given the absence of anything in the Buffalo Creek Treaty's text or legislative history supporting disestablishment, we conclude that these later documents do not "unequivocally reveal" the intention necessary to demonstrate disestablishment.[20] *Solem*, 465 U.S. at 471.

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19. This statute gives the courts of New York civil jurisdiction in actions "between Indians" or "between one or more Indians and any other person or persons." 25 U.S.C. § 233 (2000). Notably, it also provides that nothing in it "shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." *Id.*

20. Most of these documents, in particular those published by the Department of the Interior and the Commissioner of Indian Affairs, appear to rely on one another. And one of them, the Department of the Interior's 1997 Annual Report on Indian land, acknowledges that thirty-two acres in Madison County is under the jurisdiction of the Bureau of Indian Affairs ("BIA"). This is, presumably, the same land we referred to as federally protected land in *Boylan* 265 F. at 165-68.

Further, the fact that certain congressional documents and maps of the area, introduced by New York State on appeal, omit mention of an Oneida reservation in New York State does not conclusively indicate disestablishment. In fact, other relatively recent maps and documents, as the *amici* recognize, do reveal such a reservation.

Moreover, two enactments in the wake of the Buffalo Creek Treaty weigh against disestablishment. Under an 1842 treaty between the Oneidas and New York, certain Indians who had not migrated to Wisconsin sold a portion of their New York land (amounting to some 1100 acres) to the State. This treaty provided for the conveyance of certain lots to the State and other lots to non-removing Indians to be held as "common property." *Boylan*, 265 F. at 168 (quoting Treaty of 1842, arts. 1, 6). We later described this purchase as "such portion of the reservation as represented the equitable share in the proportion to the number of Indians who migrated." *Id.* at 167-68 (emphasis added). Finally, an 1843 enactment of the New York legislature, which sought to allow the Oneidas to hold their lands in severalty and (improperly) to alienate them by majority vote of the chiefs and head men of the tribe, makes explicit reference to "lands and property in the Oneida reservation." *Id.* at 169 (emphasis added) (quoting *Act Relative to the Oneida Indians, Laws of the State of New York*, 66th Sess., 244-46, Ch. 185, Sec. 1 (Apr. 8, 1843)).[21]

Sherrill and New York State also suggest that federal Indian removal policy, reflected in the Buffalo Creek Treaty, itself requires a finding that Congress intended to disestablish the reservation. In particular, the State argues that the "removal policy's goal of reducing conflicting state and tribal sovereignty could

21. Contrary to the suggestion of Madison and Oneida Counties, the fact that, under the 1843 law, individual Indians could hold the land in common, and could sell it to non-Indians under specified circumstances, does not reflect the disestablishment of the reservation.

be accomplished only if Oneida sovereignty over the area from which the Nation was obligated to remove was terminated." New York Br. at 13. But this argument ignores both the requirement that removal language be "clearly expressed," as well as the text of the Removal Act, which permits the President to provide western lands to "such tribes or nations of Indians as may choose to exchange the lands where they now reside, and move there." 4 Stat. 411 (emphasis added). The State's argument also ignores the success of the Buffalo Creek Treaty in facilitating the removal of tribes other than the OIN. As the lower court found, the Treaty provided for the absolute cession of New York land for certain tribes, in particular the Senecas and Tuscaroras. The fact that certain parts of the Treaty provided for cession and other parts did not demonstrates that when Congress wished to disestablish a reservation, it knew what language to employ.

Sherrill and the *amici* next argue that the subsequent treatment of the reservation, in particular the pattern of its settlement and its jurisdictional history, reflects a congressional intention to disestablish. They point out that few Oneida Indians reside today in Madison and Oneida Counties, and they contend that the unabated reduction over time of the reservation's members and acreage supports de facto disestablishment.

At the time of the Buffalo Creek Treaty's proclamation, however, only 5000 of the original 300,000 acres remained under Oneida ownership, principally due to sales of land to the State. And, according to the *amici*'s evidence, by far the largest influx of non-Indians to both Madison and Oneida Counties likewise occurred prior to 1840. Br. of

Amici Curiae Madison County and Oneida County at 11 (table); *id.* at 2, 7 (stating that "by the early nineteenth century, the area had lost its Indian character and had been settled and developed by non-Indians"). Not surprisingly, the most significant population changes occurred when the bulk of the land was alienated. *Id.* at 11. The fact that the Indian population and reservation acreage further decreased between 1840 and 1920 is not persuasive evidence that the Buffalo Creek Treaty was meant to disestablish the reservation.

In any event, subsequent settlement patterns are of limited use in demonstrating disestablishment. *Yankton Sioux*, 522 U.S. at 356 (finding demographic evidence the "least compelling" because "every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation"); *Hagen*, 510 U.S. at 440-41 (Blackmun, J., dissenting) ("Absent other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary demographic or jurisdictional considerations to find diminishment."). Because the Oneidas sold most of their land to the State or private parties well before the Buffalo Creek Treaty and the flood of non-Indians into the area is not clearly linked to the Treaty, the gradual reduction in the number of Oneidas living on their reservation does not reflect a clear congressional intent to disestablish it.

Finally, Sherrill contends that the continued existence of the Oneidas' reservation is incompatible with the damage award they received in *New York Indians II* as

a consequence of the appropriation of their Kansas land. Recall that in *New York Indians II*, the Supreme Court found that the Buffalo Creek Treaty had effected a present grant of the Kansas lands to the OIN and that, because the land had been improperly appropriated and settled by non-Indians, the tribes were entitled to damages in the amount the government had received as the sale price. 170 U.S. at 19-21, 36. The fact that the OIN received a portion of the resulting $ 2 million award, Sherrill argues, evidences an "exchange" of the Oneidas' New York land for land in Kansas, which supports a finding of disestablishment.

The focus of the Buffalo Creek Treaty, however, was the exchange of Wisconsin land - not New York land - for that in Kansas. *See* Buffalo Creek Treaty, arts. 1, 2. The Supreme Court's decision in *New York Indians II*, as Sherrill acknowledges, reflects this bargain. *See* 170 U.S. at 2 (petition stated that "the claimants ceded and relinquished to the United States all their right, title, and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin"); *id.* at 19, 29 (discussing case in terms of the "seizure and sale of the Wisconsin lands"). The divestiture by the Senecas and Tuscaroras of their New York land, as the Court pointed out, indicated those tribes' "intention . . . that they should take immediate possession of the tracts set apart for them in Kansas." *Id.* at 21. The Court said nothing about such a divestiture by the Oneidas.

Sherrill contends that the damage award "logically" incorporates the unstated conclusion that the Oneidas' New York reservation had been disestablished. Sherrill Br. at 40. This argument, for which Sherrill has provided

no authority, ignores what was decided in *New York Indians II*. The exchange of Wisconsin for Kansas lands under the Treaty itself was the rationale for the award; the fact that some of the Oneidas' land had not been conveyed to the government was irrelevant. The few thousand acres of New York reservation land at issue appear even less significant to the award when one considers that the Treaty included a 65,000-acre carve-out in Wisconsin so the Oneidas could maintain a reservation there. Buffalo Creek Treaty, art. 1.[22]

Construing the Buffalo Creek Treaty liberally and resolving, as we must, all ambiguities in the Oneidas' favor, we conclude that neither its text nor the circumstances surrounding its passage and implementation establish a clear congressional purpose to disestablish or diminish the OIN reservation.

IV. Continuous Tribal Existence

Sherrill further argues that there are, at a minimum, "disputed issues of fact" as to whether the OIN has

22. The case against disestablishment is further supported by the text of Article 3, which preserves Indian title to the Kansas lands (by preventing forfeiture of such title) as long as the tribe has agreed to remove; there is no divestiture requirement or other exchange. The Supreme Court in *New York Indians II* pointed out that the Oneidas had met the condition to avoid forfeiture merely by their agreement to remove. 170 U.S. at 26. Contrary to the State's suggestion, the Oneidas' agreement to remove is distinguishable from an agreement to cede their reservation; the latter could have occurred as a result of the former, but it never did because the applicable conditions were not satisfied.

maintained its tribal existence so as to be entitled to claim the properties as reservation land. It argues that the fact that the OIN is a currently recognized tribe is irrelevant, because as a practical matter it has not existed continuously over the last century. In support of this argument, Sherrill chronicles the gradual reduction in population of the OIN, pointing to statistics reflecting the non-Indian influx to Madison and Oneida Counties. Any lapse in tribal identity, Sherrill concludes, rendered the OIN's land freely alienable and precludes the tribe from asserting rights in its historic reservation land. Such a determination would, in turn, defeat the OIN's claims to tax exemption.

Sherrill's argument assumes that a tribe's land loses its reservation status in the event of a temporary lapse of tribal organization or identity. We find, however, no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land. Indeed, the Supreme Court held in *United States v. John* that a Mississippi resident of Choctaw Indian blood was properly under federal jurisdiction when he committed a crime on Choctaw land which had been designated a reservation, even though the tribe was "merely a remnant of a larger group of Indians, long ago removed . . . [and] federal supervision over them has not been continuous." 437 U.S. 634, 653, 57 L. Ed. 2d 489, 98 S. Ct. 2541 (1978).

The authority upon which Sherrill relies, which concerns the Nonintercourse Act, does not indicate

otherwise.[23] In *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994), we stated that, in order to make a prima facie case based on a violation of the Act, a group claiming to be an Indian tribe must establish that: "(1) it is an Indian tribe, (2) the land [claimed to have been alienated in violation of the Act] is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned." All four elements are satisfied here. It is undisputed that the OIN is federally recognized and the Bureau of Indian Affairs exercises jurisdiction over, at a minimum, a thirty-two acre parcel of land

23. Nor do any of the authorities listed by the dissent. It is true that some groups of Indians claiming tribal status, which were not federally recognized tribes, have been required to demonstrate "continuous tribal existence" in order to establish standing under the Nonintercourse Act. *See Oneida IIIb*, 194 F. Supp. 2d at 121 n.11 (citing *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (*Mashpee I*), and *Canadian St. Regis Band of Mohawk Indians v. State of N.Y.*, 146 F. Supp. 2d 170, 184 (N.D.N.Y. 2001)). But Sherrill and Madison have challenged neither the OIN's standing nor its current tribal status. In other cases, when relevant, courts have quite logically noted that tribes can only recover under the Nonintercourse Act if they "were tribes at the time the land was alienated." *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482 (1st Cir. 1987) (*Mashpee II*). But there is no question that the OIN was a tribe and in a trust relationship with the federal government at the time of the conveyances at issue. Neither the dissent nor Sherrill has identified any authority for the proposition that to sustain a claim under the Nonintercourse Act a federally recognized Indian tribe must demonstrate that its tribal structure remained intact continuously after unlawful conveyances of tribal land.

within Madison County, which formed part of the OIN's historic reservation. This reservation has never been disestablished, and accordingly, the "trust relationship" between the federal government and the Oneidas has never been terminated. Nor have the Oneidas ever voluntarily abandoned this trust relationship by "choosing to terminate tribal existence." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (*Mashpee I*).[24] Finally, the federal government never approved the alienation of the land at issue.

Moreover, contrary to Sherrill's contentions, even if continuous tribal existence were required, the record before us shows it. Once a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government, not the courts. *See United States v. Holliday*, 70 U.S. (3 Wall) 407, 419, 18 L. Ed. 182 (1865) ("In reference to all matters [of tribal organization], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs."); *see*

24. Sherrill, citing *Mashpee II*, argues that a temporary lapse of tribal status, however involuntary or unintended, causes "Non-Intercourse Act coverage [to] terminate[]." Sherrill Br. at 44. But *Mashpee I* makes clear that an "involuntary process of assimilation" is insufficient to constitute abandonment of tribal status, which can only occur voluntarily and willingly. *See Mashpee I*, 592 F.2d at 587. This requirement underscores the fact that a temporary lapse of tribal organization is insufficient to sever the trust relationship between a federally recognized tribe and the federal government. *See The Kansas Indians*, 72 U.S. at 757.

also Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 484 (1st Cir. 1987) (*Mashpee II*) (same). The OIN is a federally recognized tribe that is a direct descendant of the original Oneida Indian Nation. *Oneida II*, 470 U.S. at 230; *Oneida IIIb*, 194 F. Supp. 2d at 119. And Sherrill has identified no legislative or executive action withdrawing recognition.

Rather, the authorities offered by Sherrill merely reflect the opinions of a handful of government officials and commentators, at various points in the last century, that Oneida tribal relations had ceased.[25] In particular, letters from the Assistant Commissioner of Indian Affairs in 1916 and 1925 stated that the tribe no longer existed in New York.[26] This conclusion is, to some degree, understandable, since most of the Oneida reservation land had been sold to the State, with the remaining parcels divided among members who, increasingly, lived separately from one another and received state services. *See Boylan*, 265 F.

25. These authorities also include a decision of the Northern District of New York, *United States v. Elm*, 25 F.Cas. 1006, 1008, F. Cas. No. 15048 (N.D.N.Y. 1877), stating that since 1838, the Oneidas' "tribal government had ceased as to those who remained in this state." However, the decision also suggests continued tribal status, as the Oneidas "continued to designate one of their number as chief," albeit for certain financial tasks, and states that there are "20 families which constitute the remnant of the Oneidas residing in the vicinity of their original reservation . . . their dwellings . . . interspersed with the habitations of the whites." *Id.*

26. Felix Cohen, whom Sherrill also cites, relies on the same source as the 1916 letter, a 1915 memorandum by a lawyer in the Office of Indian Affairs. Cohen at 416-17 n.6 (1942).

at 167-70. But these informal conclusions are ultimately irrelevant because they do not supply the necessary federal action withdrawing the tribe from government protection we held was required in *Boylan*. *Id.* at 171. Moreover, this Court determined in *Boylan* in 1920 - between the time of the two letters in question - that the Oneida tribe did in fact exist. *Id.* at 171-72.

Because the Oneidas' reservation was not disestablished and because the Sherrill Properties are located within that reservation, we conclude that Sherrill can neither tax the land nor evict the Oneidas. Accordingly, we: (i) affirm the denial of Sherrill's motion for summary judgment or for a preliminary injunction based on its counterclaims in the Lead case; and (ii) affirm the grant of the OIN's cross-motion for summary judgment on its taxation claim and Sherrill's counterclaims[27] in the Lead case and its cross-motion for summary judgment in the Eviction case.

V. Sherrill's Rule 56(f) Motion

Sherrill and the State of New York contend, in the alternative, that the District Court prematurely decided

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27. We also agree with the lower court's conclusion that Sherrill's counterclaims were improper because the tribe is immune from suit in federal court. *See Oneida IV*, 145 F. Supp. 2d at 258-59; *see Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991) (stating that suits and cross-suits against Indian tribes are barred by tribal sovereign immunity absent a clear waiver by the tribe or congressional abrogation) (citing *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-13, 84 L. Ed. 894, 60 S. Ct. 653 (1940)).

the OIN's cross-motions for summary judgment without affording Sherrill an adequate opportunity to conduct discovery on certain critical matters, in particular: (i) whether the Sherrill Properties are located within the boundaries of the reservation recognized by the Canandaigua Treaty; (ii) whether Congress modified the Canandaigua Treaty via the Buffalo Creek Treaty or otherwise; (iii) the Oneidas' continuous tribal existence; (iv) whether the properties were encompassed by the 1805 and 1807 land transfers; and (v) whether those transfers violated the Nonintercourse Act.

Federal Rule of Civil Procedure 56(f) provides an opportunity to postpone consideration of a motion for summary judgment and to obtain additional discovery by describing: (i) the information sought and how it will be obtained; (ii) how it is reasonably expected to raise a genuine issue of material fact; (iii) prior efforts to obtain the information; and (iv) why those efforts were unsuccessful. *Sage Realty Corp. v. Ins. Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir. 1994). The District Court denied Sherrill's motion principally because Sherrill failed to explain why it was unable to obtain the discovery sought, much of which was a matter of public record, before the close of briefing. The court also noted that Sherrill had failed to identify the information sought with particularity. We review a lower court's denial of a Rule 56(f) motion for abuse of discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994).

Sherrill's Rule 56(f) affidavit is simply a list of issues on which it desires more information. No specific facts or documents are requested, and Sherrill fails to indicate

how any of the information sought could be expected to create genuine factual issues. Sherrill, moreover, has had a sufficient opportunity to develop and contest the issues on which it now claims to need additional discovery. Sherrill, like the *amici*, has submitted voluminous evidence in support of its position on disestablishment, tribal existence, and the Nonintercourse Act, evidence which the District Court fully considered. Sherrill was the first party to move for summary judgment - five months into discovery - on the issue of the OIN's tax liability. Under these circumstances, we conclude that the District Court did not abuse its discretion in denying the motion.

VI. Sherrill's Motion for Leave to Amend

In the Lead case, Sherrill moved for leave to amend its answer to add the affirmative defenses of statute of limitations, laches, waiver, estoppel, in pari delicto, and ratification, all of which the lower court denied on futility grounds. *Oneida IV*, 145 F. Supp. 2d at 259-60. On appeal, Sherrill contends that the District Court improperly denied it the opportunity to advance these defenses. We disagree.

We review the denial of a motion for leave to amend for abuse of discretion. *Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 49 (2d Cir. 1999). Where, as here, the denial was based on an interpretation of law, we review that legal conclusion de novo. *Id.* While leave to amend a pleading shall be freely granted when justice so requires, Fed. R. Civ. P. 15(a), amendment is not warranted in the case of, among other things, "futility."

Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6). *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991).

We agree with the lower court that Sherrill's proposed defenses would not survive such a motion. We find the in pari delicto and ratification defenses insufficient. *Oneida IV*, 145 F. Supp. 2d at 260. Addressing delay-based arguments in *Oneida II*, the Supreme Court held that no federal limitations period applied and that it would be improvident to apply a parallel state requirement in this uniquely federal context. 470 U.S. at 240-44. As the Court pointed out, there is no time-bar for claims brought by the United States on behalf of Indians "to establish title to, or right of possession of, real or personal property." *Id.* at 241-43 & n.15. The *Oneida II* majority also strongly suggested that a laches defense is improper for similar reasons. *Id.* at 244-45 & n.16 ("The application of laches would appear to be inconsistent with established federal policy.") (citing *Ewert v. Bluejacket*, 259 U.S. 129, 137-38, 66 L. Ed. 858, 42 S. Ct. 442 (1922) (doctrine of laches cannot bar a suit by individual Indians challenging land transactions for violating federal statutory restrictions on alienation)).

We likewise have found - in ruling on the merits of a defense in an action involving an Oneida land claim - that time-bars are inconsistent with established federal policy, because "to permit a state to enact and invoke a time-bar would in effect allow a state to terminate the relationship

of trust and guardianship between the United States and the Oneidas . . . [which] may only be terminated by federal law." *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1084 (2d Cir. 1982); *see also Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir. 1988) (accepting rejection of laches defense as law of the case). The result would be the same regardless of whether the laches defense were asserted under federal or state law. *Oneida Indian Nation*, 691 F.2d at 1084.

In asserting its waiver and estoppel defenses, Sherrill contends that the OIN's claim to aboriginal title in the properties is inconsistent with its open-market purchases. As discussed, there is, however, no inconsistency; Indian title and fee simple ownership of reservation land are distinct. We see no reason why a tribe holding both fee simple title and Indian title in a property should be prevented from suing based on the latter. Accordingly, we agree with the lower court's conclusion that Sherrill's proposed amendment to its answer in the Lead case was futile.

VII. Motion to Dismiss the Members Case

In the Members case, Sherrill contends that the OIN's officers violated state law by failing to pay property taxes and collect state sales taxes on the Sherrill Properties. Its claims against the officers with regard to property taxes are insufficient for the same reason its counterclaims against the tribe are insufficient: the parcels are not taxable. Sherrill itself acknowledged the possibility of this result in its brief on appeal. *See* Sherrill Br. at 59 ("If

. . . this Court reverses the finding of Indian country . . . then the pleading in the Members Case is sufficient . . . .").

Sherrill seeks damages for unjust enrichment arising out of the officers' alleged non-payment of state sales taxes, in particular for goods sold to non-Indians. Compl., Members Case, PP 25-27, 41-45. While individual tribal officers may be liable for nonpayment of state sales taxes where they act outside the authority of the tribe, *see Potawatomi*, 498 U.S. at 514 (citing *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 355, 358-59 (2d Cir. 2000), there is no allegation that the OIN's officers - whom Sherrill sued in their official capacities - did so here. Consequently, Sherrill's claim for damages against the OIN's officers is no different from a claim against the tribe itself for non-payment of sales taxes. Accordingly, since the District Court correctly concluded that these officers were immune from suit on the claims related to collection of sales taxes, we affirm the dismissal of the Members case.[28]

VIII. Motions in the Related Case

Madison appeals from (i) the District Court's denial of its motion to dismiss pursuant to Federal Rule of Civil Procedure 19 for failure to add the Wisconsin and Thames Oneidas as plaintiffs in the Related case; and (ii)

28. We need not address the additional ground upon which the District Court found the Members case insufficient, namely, that Sherrill failed to add the OIN as a necessary and indispensable party. *See Oneida IV*, 145 F. Supp. 2d at 263-64.

the District Court's *sua sponte* award of judgment on the pleadings to the OIN. *See Oneida IV*, 145 F. Supp. 2d at 264; *Oneida Indian Nation of N.Y. v. Madison County*, 145 F. Supp. 2d 268 (N.D.N.Y. 2001).

A. Rule 19

Reviewing for abuse of discretion, *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 725 (2d Cir. 2000), we affirm the lower court's determination that the Wisconsin and Thames Oneidas were not necessary (and hence not indispensable) parties. Federal Rule of Civil Procedure 19(a) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Should a district court determine that a non-party is necessary but is not able to join him, Rule 19(b) requires it to consider, among other things, "to what extent a

judgment rendered in the person's absence might be prejudicial to the person or those already parties," in determining whether the action must be dismissed.

Madison contends that the Wisconsin and Thames Oneidas are necessary and indispensable parties in the Related case because of their involvement in other land claim litigation currently pending in the Northern District of New York. *See supra* Part II; *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61; *Oneida IIIb*, 194 F. Supp. 2d 104. The parties whose interests Madison contends require protection, however, deny they require it. On the contrary, the Wisconsin and Thames Oneidas insist that their interests are aligned with, and adequately protected by, the OIN and they will not be prejudiced if they are not joined. *See* 6/15/00 Aff. of Arlinda Locklear; 6/23/00 Aff. of Carey R. Ramos (submitted in 00-CV-506). Moreover, the OIN can obtain the requested declaratory and injunctive relief without the other branches as parties. Accordingly, the District Court did not abuse its discretion in determining that the Wisconsin and Thames Oneidas are not necessary, and hence not indispensable, parties. *See ConnTech Dev. v. Univ. of Conn. Ed. Props., Inc.*, 102 F.3d 677, 682 (2d Cir. 1996).

B. Judgment on the Pleadings

In awarding judgment on the pleadings in the Related case to the OIN, the District Court determined that:

> all the facts in the Lead Case likewise apply in this case. Moreover, as Madison County appeared as amicus curiae in the Lead Case,

> it had a full opportunity to be heard on the taxation issue. Accordingly, based upon the foregoing determination that the properties at issue are Indian Country and therefore not taxable, the Nation is entitled to judgment on the pleadings.

Oneida IV, 145 F. Supp. 2d at 264.

We believe that this sua sponte dismissal of the Related case "on the pleadings" was procedurally improper. Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings only "after the pleadings are closed." Although Madison had moved to dismiss the complaint under Rule 19(a) for failure to join necessary and indispensable parties, it has not answered the complaint. Madison contends that, if it had an opportunity to answer, it would raise defenses distinct from those of Sherrill - although it neglects to articulate those defenses. Further, the sole ground the court provided for its decision to dismiss the case was that "all the facts in the Lead Case apply in this case." Different parcels, however, are at issue. And although there is some evidence in the record indicating that the Madison properties were part of the Oneidas' historical reservation, this evidence is meager. It may well be that the lower court's instincts on the merits of Madison's claims are correct. But rather than attempt to decide the issue based on an incomplete record, we vacate this portion of the judgment and remand for further proceedings.

Appendix C

CONCLUSION

For the foregoing reasons, we affirm: (i) the denial of Sherrill's motion for summary judgment or, in the alternative, for a preliminary injunction based on its counterclaims in the Lead case; (ii) the denial of Sherrill's motion for leave to amend its answer in the Lead case; (iii) the denial of Sherrill's Rule 56(f) motion; (iv) the grant of the OIN's cross-motion for summary judgment in the Lead and Eviction cases; and (v) the grant of the OIN's officers' motion to dismiss the Members case. We vacate the dismissal of the Related case and remand for further proceedings consistent with this opinion.

DISSENT BY: VAN GRAAFEILAND,

DISSENT

VAN GRAAFEILAND, *Senior Circuit Judge, dissenting*:

I agree with my colleagues that the district court erred in granting judgment on the pleadings against Madison county. However, I disagree with their affirmance of summary judgment against Sherrill in the lead case. Accordingly, I dissent with respect to the court's holdings against Sherrill.

In the first paragraph of the majority opinion, we are instructed not to confuse the Oneida Indian Nation of New York, identified in the opinion by the terms "OIN" or "the Oneidas" with the Oneida Indian Nation, "which is not

a federally recognized tribe and is not a party to these consolidated cases." The opinion then continues: "The Oneidas lived on what became central New York State long before the founding of the United States." Despite my colleague's admonishment, I assume that Judge Parker uses the word "Oneidas" here to mean the race as a whole, not the Oneida Indian Nation of New York. I see nothing in the record to indicate that the Oneida Indian Nation of New York, which, after all, could not have been in existence before its namesake state, has existed from time immemorial. Although some courts apparently have accepted that aboriginal rights can be inherited somehow by a successor tribe that has no aboriginal rights of its own, I am not persuaded. Moreover, even assuming that aboriginal rights are heritable, I believe that there exists a substantial question as to whether any such rights inherited by the Oneida Indian Nation of New York were forfeited because its tribal existence was abandoned for a discernable period of time.

Rather than add another hundred-page opinion to the quagmire that presently exists in this area, I simply offer the following statements from what I believe are authoritative sources:

. "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *U.S. v. Cook*, 86 U.S. 591, 593, 22 L. Ed. 210 (1873).

. "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under

it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to and end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38, 61 L. Ed. 414, 37 S. Ct. 142 (1916).

. "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that . . . the trust relationship between the United States and the tribe has not been terminated or abandoned." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) (emphasis added).

. "Certainly individual Indians or portions of tribes may choose to give up tribal status. . . . If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp*, 592 F.2d 575, 587 (1st Cir. 1979) (citations omitted).

. "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932).

. "Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land[.]" *Quapaw Tribe of Indians v. U.S*, 128 Ct. Cl. 45, 120 F. Supp. 283, 286 (Ct. Cl. 1954).

. "Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe constitutes a defense to the aboriginal claim." COHEN FELIX S., FEDERAL INDIAN LAW, Ch. 9, Sec. A2a (1982).

. "The right of occupancy and possession is lost by abandonment, and possession, when abandoned by the Indians, attaches itself to the fee without further grant." 42 C.J.S. Indians ' 70 (1991). The majority claims that the historical records offered by Sherrill to show that the Oneidas cannot establish continuous tribal existence "merely reflect the opinions of a handful of government officials and commentators[.]" My colleagues' attempts to minimize the significant evidence of tribal dissolution in the record are misleading. Sherrill cites numerous persuasive authorities, most notably contemporaneous reports by both the Commissioner of Indian Affairs and the Department of the Interior, in support of its argument that the tribe ceased to function for a period of time:

. "[The Oneida] tribal government has ceased as to those who remained in [New York] state. . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity . . . . They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *U.S. v. Elm*, 25 F. Cas. 1006, 1008, F. Cas. No. 15048 (N.D.N.Y. 1877).

. "The Oneida Indians have no reservation. . . . [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." 1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior. (JA 1229).

. The 1892 Census map of New York depicts no Oneida reservation. (JA 995).

. "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior. (JA 1231).

. "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in

Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." 1900 Annual Reports of the Department of the Interior. (JA 1234).

. "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections. . . . At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." 1901 Annual Reports of the Department of the Interior. (JA 1238-39).

. "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have 'squatted' on the Onondaga Reserve: so many of these have intermarried with the Onondaga as to preclude any probability of their removal. . . . About 120 of them are carried on the agency rolls as 'Oneidas at Oneida' which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." 1906 Annual Reports of the Department of the Interior. (JA 1241). Ironically, after dismissing these federal authorities out of hand, the majority argues that recognition of the Oneida Indian

Nation of New York by the Bureau of Indian Affairs, which is merely the modern day corollary to the Department of the Interior offices responsible for most of the above-cited reports, must end our inquiry into the tribe's continuous tribal existence. I disagree. Our court, in Golden Hill, observed that "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act." *Id.* at 57. We further stated that, "regardless of whether the BIA were to acknowledge Golden Hill as a tribe for purposes of federal benefits, Golden Hill must still turn to the district court for an ultimate judicial determination of its claim under the Nonintercourse Act." *Id.* at 58. "The two standards overlap, though their application might not always yield identical results." *Id.* at 59.

Moreover, the degree of deference we owe to BIA recognition in this case ought to be carefully measured, not only because prior reports by the Department of the Interior cast doubt on the continual existence of the New York Oneidas, but also because BIA recognition was granted to the Oneida Indian Nation of New York prior to the BIA's creation of the comprehensive regulations set forth in 25 C.F.R. Part 83 in 1978. In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA "has not historically spent much effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt." *Mashpee*, 592 F.2d at 581. It seems unlikely that the Oneida Indian Nation of New York volunteered to the BIA any evidence that would have

weakened its tribal recognition claim, especially when one considers that they apparently were unresponsive to Sherrill's discovery requests on this issue during litigation. Our court ought not to accept reflexively BIA recognition as dispositive of continuous tribal existence when that recognition was granted before the Bureau had adopted its comprehensive criteria and when the record contains such compelling evidence of a period of tribal dissolution.

The majority also contends that the issue of the Oneida's tribal existence was satisfactorily resolved by our court in *Boylan*. However, *Boylan* was decided nearly six years before the Supreme Court enunciated in *U.S. v. Candelaria*, 271 U.S. 432, 442, 70 L. Ed. 1023, 46 S. Ct. 561 (1926), the requirements for establishing tribal existence under the Nonintercourse Act. Following *Candelaria,* an Indian group seeking to prove tribal existence was required to show that it was "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territiory." *Id.* (citation omitted); *see also Golden Hill*, 39 F.3d at 59. It is far from clear that the *Boylan* majority would have reached the same conclusion under the *Candelaria* criteria.

With all of the foregoing as background, we now come to the question that constitutes the heart of this appeal: viz. do my colleagues err in granting summary judgment in favor of the tribe? I believe that the question must be answered in the affirmative. The standard for summary judgment bears repeating. The burden is on the moving

party to establish that there exists no genuine issue as to any material fact. *See Opals On Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 367 (2d Cir. 2003); *Burtnieks v. City of New York*, 716 F.2d 982, 985 (2d Cir. 1983); *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626 (2d Cir. 1972). All evidentiary material submitted must be viewed in the light most favorable to, and all inferences must be drawn in favor of, the non-moving party. *See United States v. Diebold*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1961); *Opals on Ice*, 320 F.3d at 367; *Burtnieks*, 716 F.2d at 985. Bearing in mind the deference that we owe Sherrill under these standards, summary judgment clearly should not be granted to the plaintiff. The record presents significant, unresolved questions of fact as to whether the Oneida Indian Nation of New York has been in existence continuously over the last century and a half.

APPENDIX D — MEMORANDUM DECISION AND ORDER AND PERMANENT INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DECIDED JUNE 2, 2006

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

6:05-CV-945

ONEIDA INDIAN NATION,

Plaintiff,

-v-

ONEIDA COUNTY,

Defendant.

June 2, 2006, Decided

JUDGES: David N. Hurd, United States District Judge.

OPINION BY: David N. Hurd

OPINION

MEMORANDUM-DECISION and ORDER and PERMANENT INJUNCTION

Appendix D

I. *INTRODUCTION*

Plaintiff Oneida Indian Nation ("the Nation") commenced this action on July 27, 2005, seeking declaratory and injunctive relief preventing defendant Oneida County from foreclosing, for non-payment of taxes, property owned by the Nation. On October 28, 2005, a Temporary Restraining Order was issued restraining and enjoining Oneida County from undertaking any further efforts to effectuate, maintain or complete administrative or other foreclosures or to withdraw the right of redemption as to lands possessed by the Nation in Oneida County. On November 2, 2005, a Joint Stipulation was filed by the Nation and Oneida County extending the Temporary Restraining Order and setting forth a timetable for filing and briefing motions.

On November 29, 2005, the Stockbridge-Munsee Band of Mohican Indians ("Stockbridge") filed a motion to intervene. Oneida County did not object. Amicus State of New York ("the State") concurred with the position of Oneida County. The Nation opposes.

In accordance with the stipulation of the parties, the Nation filed a motion for summary judgment. Oneida County opposed and cross-moved for summary judgment. The State filed an amicus brief opposing the Nation's motion and supporting Oneida County's cross-motion.

Oral argument was heard on January 30, 2006, in Utica, New York. Decision was reserved.

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II. *BACKGROUND*

The historical background set forth in the prior decisions regarding Madison County and the City of Sherrill likewise applies here. *See Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.,* 145 F. Supp. 2d 226, 233-36 (N.D.N.Y. 2001), *aff'd,* 337 F.3d 139, 146-52 (2d Cir. 2003), *vacated & remanded,* 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005); *Oneida Indian Nation of N.Y. v. Madison County,* 401 F. Supp. 2d 219, 222-223 (N.D.N.Y. 2005); *see also Oneida Indian Nation of N.Y. v. Madison County,* 145 F. Supp. 2d 268 (N.D.N.Y. 2001), *vacated & remanded,* 337 F.3d 139 (2d Cir. 2003). The following undisputed facts are specific to this action.

At issue in this litigation are 280 properties owned by the Nation that are located within Oneida County. Part of the Oneida Indian Reservation, as reserved to the Nation in the 1788 Treaty of Ft. Schuyler and confirmed in the 1794 Treaty of Canandaigua, ("the Reservation") lies within the boundaries of Oneida County. All of the 280 properties at issue here fall within the Reservation. (Thomas Decl. P8.)[1]

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1. Oneida County denies that this fact is material. It also denies that some or all of the properties are within the Reservation, relying upon the failure of the United States Supreme Court to reach the issue of whether the 1838 Treaty of Buffalo Creek disestablished the Reservation and the attempt by Stockbridge to intervene with regard to the six-mile-square property reserved to it. (*See* Def.'s Resp. to Statement of Undisputed Facts.) However, Oneida County has not made a citation to the record which would establish a dispute as to this fact.

Appendix D

Oneida County follows a tax foreclosure process set forth in Chapter 559 of the Laws of 1902, as amended ("the County Tax Law"). (Yerdon Aff. of Regularity P3.) Tax bills are distributed to property owners in December, covering taxes for the following year. *Id.* P4. The tax bill becomes a lien as of January 1. *Id.* The taxes are due by January 31. *Id.* Beginning on February 1, interest and penalties begin to accrue. *Id.* The tax bill shows outstanding amounts owed from the previous year in addition to the current year's taxes. *Id.* Although not required by the County Tax Law, in February a delinquent notice is sent to each taxpayer whose bill has not been paid. *Id.* P5.

Pursuant to the County Tax Law, whenever a tax remains unpaid for six months, the County Treasurer advertises and sells the parcel. *Id.* P6. After the expiration of the six months, a notice is published in a local newspaper once a week for six weeks specifying a "tax sale date" on which the tax liens will be sold at tax auction. *Id.* P7. The County Treasurer then prepares certificates of sale for all parcels purchased. *Id.* Ordinarily the required newspaper notices are published in November and December, after which proof of publication is filed with the Oneida County Clerk. *Id.* P8. The tax sale is then held on the last business day of December. *Id.* The Commissioner of Finance is authorized to purchase all such liens at the tax sale without offering for public bid. *Id.* P9.

This procedure was followed with regard to each of the Nation's parcels. *Id.* P10. Specifically, unpaid tax bills were levied with penalties and interest, notices of the tax sale were published, proof of publication was filed, Oneida

County bid on all parcels at the tax sale, and certificates of sale were created. *Id.*

After the date of the sale, the County Tax Law provides that the property may be redeemed "for any real estate taxes sold at any time within one year thereafter by paying the sum of $ 1.00, plus the principal amount of taxes due, together with statutory penalties and interest." *Id.* P11. The County Tax Law also provides that not more than three months prior to the expiration of the allowable redemption period (the "Redemption Deadline"), the County Treasurer publishes a weekly notice for three consecutive weeks in a local newspaper. *Id.* P23. Proof of publication is then filed. *Id.* P13. The notices of redemption are generally published in October. *Id.* P14.

Although the Redemption Deadline is one year after the tax sale, Oneida County provides an additional two-year redemption period. *Id.* P15. At the end of the three-year period, a Final Notice Before Redemption is prepared. *Id.* P18. The Final Notice Before Redemption gives the recipient an additional thirty days within which to redeem the property by tendering payment of the outstanding taxes and penalties owed. *Id.* The Final Notice Before Redemption is generally transmitted by certified mail to all interested parties. *Id.* At the expiration of the thirty-day allowable redemption period, the County Treasurer executes and delivers a conveyance of the parcel to the certificate holder, in this case, Oneida County. *Id.* P23.

On June 3, 2005, the Deputy Commissioner of Finance personally delivered Final Notices Before Redemption

(dated June 1, 2005) to the Nation, with regard to 59 parcels. *Id.* P19. The notices stated that the redemption period ended on July 29, 2005. Deeds were executed on June 17, 2005, purportedly conveying the properties to the Oneida County Board of Legislators to be held in trust for the County. This action was then commenced by the Nation seeking to prevent Oneida County from pursuing foreclosure and conveyance of Nation lands. On August 1, 2005, the parties reached an agreement pursuant to which the Nation remitted $ 650,000.00 to Oneida County, in exchange for extension of the redemption period for the 59 parcels[2] through the completion of this litigation. (Carvelli Aff. Ex. A.)

On September 26, 2005, the Deputy Commissioner of Finance for Oneida County delivered additional Final Notices Before Redemption to the Nation covering 62 parcels. These notices, dated September 21, 2005, set a final redemption date of October 29, 2005. Again on October 27, 2005, Final Notices Before Redemption covering 66 parcels were delivered to the Nation. (Yerdon Aff. of Regularity P20.) As noted above, on October 28, 2005, the Nation sought and obtained a restraining order preventing further foreclosure efforts, which continues in effect by stipulation of the parties.

III. *SUMMARY JUDGMENT STANDARD*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories,

2. At some point the Nation redeemed six of these parcels.

admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. at 586, 106 S. Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; *Liberty Lobby, Inc.,* 477 U.S. at 250, 106 S. Ct. at 2511; *Matsushita Elec. Indus. Co.,* 475 U.S. at 587, 106 S. Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a [*289] reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.,* 477 U.S. at 248-49, 106 S. Ct. at 2510; *Matsushita Elec. Indus. Co.,* 475 U.S. at 587, 106 S. Ct. at 1356.

Appendix D

IV. *DISCUSSION*

A. *Summary Judgment*

The parties propound four bases upon which each argues it is entitled to summary judgment regarding foreclosure. There also are contrary arguments regarding the propriety of imposing penalties and interest. Each will be discussed seriatim.

1. Nonintercourse Act, 25 U.S.C. § 177

The "Nonintercourse Act restricts the alienation of Indian land without Congressional approval." *Madison County,* 401 F. Supp. 2d. at 228 (citing *Sherrill,* 544 U.S. 197, 125 S. Ct. at 1484 & n. 2, 161 L. Ed. 2d 386). The reasoning set forth in the Madison County case, *id.* at 227-28, applies here as well.[3] Accordingly, the Nonintercourse Act precludes Oneida County from foreclosing upon the parcels at issue here (the Nation's land) and summary judgment will be granted to the Nation.

2. Tribal Sovereign Immunity

The Nation is a federally recognized Indian Tribe which has not waived its sovereign immunity with regard to its real property. Further, Congress has not abrogated that

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3. Oneida County's argument that the Madison County decision is inapposite here because it was wrongly decided is not well taken. Determining the correctness of that decision now lies within the purview of the Second Circuit.

immunity with regard to the Nation's real property. The reasoning in the Madison County case, *id.* at 228-30, also applies with regard to properties located in Oneida County. Thus, sovereign immunity bars any suit against the Nation, including one to foreclose upon its property.

3. Due Process

The Nation argues it was not provided due process in the notification procedure regarding redemption followed by Oneida County. It contends that less than two months notice (from the date the Final Notices Before Redemption were served upon it until the end of the redemption period) failed to comport with due process although this notice procedure was apparently in compliance with the County Tax Law. In fact, according to Oneida County, the only notice of the redemption period, prior to the Final Notice Before Redemption, was by publication in a local newspaper. The Nation contends that notice of the redemption deadline must have been served upon it at the beginning of the redemption period in order to provide the process that was due. Oneida County argues to the contrary that as long as it complied with the notice requirements of the County Tax Law, due process is provided.

It is a requirement of due process that a property owner be properly notified of a tax sale and redemption period. *City of Sherrill,* 145 F. Supp. 2d at 257 (citing *McCann v. Scaduto,* 71 N.Y.2d 164, 176, 519 N.E.2d 309, 524 N.Y.S.2d 398 (N.Y. Ct. App. 1987); *Yagan v. Bernardi,* 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (N.Y. App. Div. 4th Dep't 1998)). In *McCann,* the applicable county code

provided that a tax lien resulted from unpaid taxes, and that a date for the sale of the tax liens be set. 71 N.Y.2d at 170. Notice of the tax lien sale date was by publication. *Id.* A two-year redemption period followed the tax lien sale. *Id.* Additional notices by publication were required. *Id.* If the tax lien was not redeemed within twenty-one months, the tax lien purchaser was required to serve upon the owner and other specified parties, by certified mail return receipt requested, a notice to redeem within three months. *Id.* at 171. The Court of Appeals of New York found that this statutory scheme failed to provide due process because owners had not been given actual notice of the tax lien sale and redemption period. *Id.* at 177. Specifically, the *McCann* Court found that actual notice three months prior to the end of the redemption period was insufficient. *Id.* Rather, the court determined, in line with the legislatively-designed redemption period, that actual notice of the tax lien sale must be given. *Id.*

Here Oneida County applies a three-year redemption period to all tax liens. However, only notice by publication is provided regarding the tax lien sale and redemption period. Oneida County does not provide actual notice to the landowner until thirty days prior to the end of the redemption period. This mechanism is strikingly similar to the one held unconstitutional in *McCann. See* 71 N.Y.2d at 177-78. The major difference is that here actual notice is given thirty days prior to the end of the redemption period, whereas in *McCann* actual notice was given three months before the redemption period ended. Accordingly, Oneida County's mechanism under the County Tax Law fails to provide due process. Failure to provide actual notice to

the Nation of the tax lien sale and the redemption period, at the beginning of the redemption period, violates the Nation's right to due process and it is entitled to summary judgment on this basis.

4. State Law

The Nation contends that its real property within the Reservation is not taxable pursuant to N.Y. Real Prop. Tax Law § 454 and N.Y. Indian Law § 6. Oneida County argues that abstention should apply with regard to issues of state tax law. As with the discussion regarding the Nonintercourse Act, the parties' arguments with regard to state law mirror those arguments made in the Madison County case. Thus, the reasoning set forth there applies here, *see* 401 F. Supp. 2d at 231, and repetition is unnecessary. Similarly, the previous analysis applies to Oneida County's argument regarding abstention. *See id.* at 224-25. Oneida County is not entitled to summary judgment based upon abstention, and the Nation is entitled to summary judgment based upon state law.

5. Penalties and Interest

Oneida County argues that penalties and interest may be levied on the subject parcels, relying upon the *Sherrill* holding that there is no immunity from taxes. *See* 125 S. Ct. at 1489-90. Oneida County also relies upon the fact that it followed state law in assessing the interest and penalties. The Nation argues that equitable principals must be applied to preclude assessment of penalties and interest for nonpayment of taxes for the period prior to the

Sherrill decision of March 29, 2005, when taxes were not known to be due.[4]

During the time period in which Oneida County assessed penalties and interest it was the law in this Circuit that these parcels were tax exempt. *See City of Sherrill, N.Y.,* 145 F. Supp. 2d at 266 (holding that Nation-owned property within the Reservation is non-taxable); 337 F.3d at 167 (affirming the lower court holding regarding non-taxability of Nation land). It would be inequitable to permit Oneida County to assess interest and penalties for non-payment of taxes during a time when it was the law that the lands were not taxable. *See Hecht v. Gertler,* 204 A.D.2d 322, 323-24, 611 N.Y.S.2d 286 (N.Y. App. Div. 2d Dep't 1994) (modifying a lower court order that retroactively assessed penalties); *LaFayette Cent. Sch. Dist. v. Niagara Mohawk Power Corp.,* 129 A.D.2d 989, 989-90, 514 N.Y.S.2d 297 (N.Y. App. Div. 4th Dep't 1987) (modifying a lower court order imposing interest on taxes accrued when an exemption from such taxes was in effect, although the exemption was later found to have been improper). It is also notable that Oneida County cites no authority for the proposition that interest and penalties may be imposed for non-payment of taxes that were only later found to have been due at the earlier time. Accordingly, equity precludes the imposition of interest and penalties for the period prior to March 29,

4. The Nation also urges that equity requires that the monies it gave to localities in Silver Covenant Chain Grants during the period prior to the *Sherrill* decision be used to set off any tax assessments. However, the amount of taxes due is not at issue in this action. Accordingly, the issue regarding Silver Covenant Chain Grants will not be reached.

2005, and the Nation is entitled to summary judgment on this basis.

B. *Declaratory and Injunctive Relief*

Again, the previous analysis balancing benefit and harm applies here, *see id.* at 231-32, weighing in favor of granting the Nation declaratory and injunctive relief. Oneida County argues that it will be irreparably harmed by the Nation's "accelerating number of properties acquired" and their refusal to pay taxes owed. (Def.'s Mem. at 21.) It also contends that a checkerboard of jurisdiction is contrary to the public interest. As was previously noted in the Madison County case, Oneida County must find an alternative method, other than foreclosure, to obtain the taxes owed. *See* 401 F. Supp. 2d at 232. Moreover, the question of a jurisdictional checkerboard is to be resolved in the Nation's pending land trust application. The Nation is entitled to declaratory and injunctive relief.

C. *Motion to Intervene*

Stockbridge moves to intervene pursuant to Fed. R. Civ. P. 24(a). The purpose of Stockbridge's proposed intervention is solely to obtain dismissal of this action to the extent any parcels at issue here overlap with its (purported) six-mile-square reservation. (Stockbridge Mem. at 3.)

Pursuant to Rule 24(a) intervention as of right is appropriate, upon a timely application, when a federal statute "confers an unconditional right to intervene" or if the proposed intervener "claims an interest relating

to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Id.*

As noted, Stockbridge's asserted interest in this action is to obtain dismissal of any claim related to parcels that are within its claimed reservation. However, it specifically reserves its sovereign immunity with regard to any claim to the six-mile-square reservation land. Thus, if Stockbridge was permitted to intervene and dismissal of the desired claims was granted, Oneida County would proceed with its foreclosure action and divest the Nation of title to the applicable parcels. However, the Nation is precluded from making any claim to the six-mile-square reservation land because of Stockbridge's sovereign immunity. This anomalous result demonstrates Stockbridge's lack of interest in this litigation. If it obtained the relief it seeks—dismissal of claims regarding parcels within the six-mile-square area—only the Nation's and Oneida County's interests would be affected. In fact, Stockbridge recognizes that its purported ownership interest in the six-mile-square area is being litigated in the land claim action also currently pending. (Stockbridge Mem. at 2 (referencing Civil Action No. 86-CV-1140).) Accordingly, Stockbridge does not qualify to intervene pursuant to Fed. R. Civ. P. 24(a), and its motion to do so will be denied.

V. *CONCLUSION*

The remedy of foreclosure is not available to Oneida County pursuant to the Nonintercourse Act, 25 U.S.C. § 177, N.Y. Real Prop. Tax Law § 454, and N.Y. Indian Law § 6. Notification by mail to the Nation of the end of the redemption period less than two months before its expiration failed to provide the Nation the process it was due; therefore, Oneida County cannot proceed with the foreclosures. Tribal sovereign immunity also insulates the Nation from any foreclosure action. Equity precludes the imposition of penalties and interest for taxes unpaid during a time when the properties were tax-exempt under the law. The Nation is entitled to the declaratory and injunctive relief it seeks. Finally, Stockbridge has no interest in this action and therefore is not entitled to intervene as of right.

In conclusion, it would be wise for all sides to ponder the words of President Abraham Lincoln in his annual message to Congress on December 1, 1862. The words still ring true today.

> Fellow citizens, *we* cannot escape history. We . . . will be remembered in spite of ourselves. No personal significance, or insignificance can spare one or another of us. The . . . trial through which we pass, will light us down, in honor or dishonor, to the latest generation. . . .
>
> The dogmas of the quiet past, are inadequate to the . . . present. . . . We must think anew, and act anew. We must disenthrall ourselves.

If the last words are heeded, and the parties resolve the many land claim issues with good will and friendship between nations, the citizens of this time and place will be remembered by future generations with admiration and gratitude. In the alternative, future generations will still be coping with an endless stream of federal and state lawsuits, land claims, and land trust applications.

Accordingly, it is

ORDERED that

1. The Oneida Indian Nation's motion for summary judgment is GRANTED;

2. Oneida County's cross-motion for summary judgment is DENIED;

3. The motion by the Stockbridge-Munsee Band of Mohican Indians to intervene is DENIED;

4. Oneida County is permanently enjoined from any attempt to foreclose on Oneida Indian Nation property or in any other way alter title to Oneida Indian Nation property;

5. Oneida County is permanently enjoined from assessing and/or collecting penalties and interest on unpaid taxes prior to March 29, 2005, against the Oneida Indian Nation; and

6. Oneida Indian Nation's reservation was not disestablished.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

David N. Hurd

United States District Judge

Dated: June 2, 2006

Utica, New York.

APPENDIX E — MEMORANDUM DECISION AND ORDER AND PERMANENT INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DECIDED OCTOBER 27, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

5:00-CV-506

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff,

vs

MADISON COUNTY,

Defendant.

October 27, 2005, Decided

JUDGES: DAVID N. HURD, United States District Judge.

OPINION BY: DAVID N. HURD

OPINION

Appendix E

MEMORANDUM-DECISION and ORDER and PERMANENT INJUNCTION

A Nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability.

President Abraham Lincoln

Annual Message to Congress

December 1, 1862

A district court should not permit the taking of a sovereign nation's land against its will by foreclosure or any other means, without the express approval of the United States Government. In this country such an extraordinary remedy—taking a sovereign nation's land against its will—has never been legally sanctioned.

I. INTRODUCTION

On June 7, 2005, plaintiff Oneida Indian Nation of New York ("the Nation") filed a motion for summary judgment. Defendant Madison County ("the County") opposed and cross-moved for summary judgment pursuant to Fed. R. Civ. P. 56. The County also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the Nation opposed. New York State, as amicus curiae, filed a brief in support of the County. Oral argument was heard on September 7, 2005, in Utica, New York. Decision was reserved.

Appendix E

II. BACKGROUND

The Nation filed this action seeking to prevent the County from assessing and enforcing property taxes against Nation-owned property. On June 4, 2001, a Memorandum-Decision and Order issued in this and related cases holding, inter alia, that the lands at issue "are Oneida Reservation lands and therefore are Indian Country . . . . As Indian Country, the properties are not subject to taxation" by the County. *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 266 (N.D.N.Y. 2001).[1] In addition, the County was enjoined and restrained "from taking any act to impose property taxes upon, or to collect property taxes with respect to" thirteen parcels that were the subject of a 1999 foreclosure action. *Id.* at 267-68. A judgment was entered accordingly. Pursuant to a mandate issued by the United States Court of Appeals for the Second Circuit, the judgment was vacated. *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 171 (2d Cir. 2003). The Second Circuit found that the record before it was incomplete as to whether the Madison County parcels "were part of the Oneidas' historical reservation." *Id.* Accordingly, the matter was remanded for further proceedings. *Id.*

The United States Supreme Court granted certiorari in the companion cases. *City of Sherrill v. Oneida Indian Nation*, 542 U.S. 936, 124 S. Ct. 2904 (2004). The Court rejected "the unification [of fee and aboriginal title] theory" and held "that 'standards of federal Indian law and federal

1. The subsequent history for this case is set forth in the following text.

equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." 544 U.S. 197, 161 L. Ed. 2d 386 (2005) ("Sherrill"). Stated another way, the Court held "that the Oneida Indian Nation is not now immune from the taxing authority of local government." *Id.* at 1494 (Souter, J., concurring). Rehearing was denied.[2] 125 S. Ct. 2290, 161 L. Ed. 2d 1103 (2005).

III. FACTS

An extensive background of facts is set forth in the prior decisions, familiarity with which is assumed. See 337 F.3d at 144-53; 145 F. Supp. 2d at 232-36. Only the facts necessary for resolution of the motions are set forth below. The following facts are undisputed unless otherwise noted.

Since the late 1990s the Nation has been reacquiring properties in the County and elsewhere. The Nation currently owns 113 parcels in the County. There is now no dispute that all are within the boundaries of the reservation as described in the Treaty of Ft. Schuyler and the Treaty of Canandaigua.

The County assessed taxes against Nation-owned parcels, and included the parcels in its yearly foreclosure actions in state court. It was the County's practice to then withdraw the parcels owned by the Nation, in anticipation of a resolution of the taxability question in Sherrill.

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2. The City of Sherrill and the Nation reached a settlement and filed a Compact and Stipulation of Dismissal on October 18, 2005.

Appendix E

The County assessed 2003 taxes against ninety-eight parcels. These parcels were included in the County's 2003 foreclosure action. However, the County did not withdraw Nation-owned properties from the foreclosure action, as had been its practice. The County instituted a foreclosure action in state court on November 14, 2003. The Petition and Notice of Foreclosure was published in December 2004 and January 2005, and was mailed to the subject parcel owners, including the Nation, on December 8, 2004. The specified last day for redemption of these ninety-eight Nation-owned parcels was March 31, 2005.

The Supreme Court decided Sherrill on March 29, 2005, resolving the issue of taxability of reacquired Nation property. On April 28, 2005, the County filed a motion for summary judgment in the 2003 state court foreclosure action. If successful on the motion, possession and title to the properties would be awarded to the County. Accordingly, a preliminary injunction issued enjoining the County from proceeding with the foreclosure action. *Oneida Indian Nation of N.Y. v. Madison County*, 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005).

IV. DISCUSSION

A. Standards

1. Motion to Dismiss

A cause of action shall not be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set

of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99, 102 (1957). In considering a motion brought pursuant to Fed. R. Civ. P. 12(b), the court must assume all of the allegations in the complaint are true. Id. In reviewing the sufficiency of a complaint at the pleading stage, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 1686 (1974).

Where a motion to dismiss is made prior to any discovery or the filing of an answer, the court is loath to dismiss the complaint, regardless of whether the plaintiff is unlikely to prevail, unless the defendant can demonstrate that plaintiff is unable to prove facts which would entitle him to relief. *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 22 (2d Cir. 1982); see also *Egelston v. State Univ. College at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976).

2. Summary Judgment

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2509-10 (1986). The moving party carries the initial burden of demonstrating

an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548, 2552 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348, 1356 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S. Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-49, 106 S. Ct. at 2510; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356.

B. Analysis

1. County's Motion to Dismiss

The County asserts the doctrine of abstention and lack of subject matter jurisdiction (due to the "prior-exclusive-jurisdiction" rule applicable to in rem proceedings) as bases for dismissal. It is therefore appropriate to first address the County's motion to dismiss.

Appendix E

a. Abstention

The doctrine of abstention may be applied by a federal court to "decline to exercise or postpone the exercise of its jurisdiction" when the same issue is also presented in a state court with concurrent jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236, 1244 (1976). However, "'it is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 3 L. Ed. 2d 1163, 79 S. Ct. 1060, 1063 (1959)). Abstention is appropriate "'only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.'" *Id.* (quoting *County of Allegheny*, 360 U.S. at 188-89, 79 S. Ct. at 1063). Additionally, a federal court should never abstain from a suit "'merely because a State court could entertain it.'" *Id.* at 813-14, 96 S. Ct. at 1244 (quoting *Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341, 361, 95 L. Ed. 1002, 71 S. Ct. 762, 774 (1951) (Frankfurter, J., concurring in result)). Abstention may be applied in only three categories of cases. *Id.* at 814, 96 S. Ct. at 1244.

The first category of cases to which the abstention doctrine may be applied is those "'cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Id.* (quoting *County of Allegheny*, 360 U.S. at 189, 79 S. Ct. at 1063). The only federal constitutional question presented here is whether the notice provided to

the Nation of the impending foreclosure constituted due process. This issue would not be mooted by a decision in the state action. A state court determination of pertinent state law would not result in presentation of this issue in a different posture. See *id.* Accordingly, this case does not fit within the first category of cases to which abstention might be appropriate. See *id.*

The next category of cases are those "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.* At issue here are the federal questions of application of a federal statute (the Nonintercourse Act), Tribal sovereign immunity, and due process. There is no "difficult question[ ] of state law" presented. See *id.* Thus, this case also does not fit within the second category.

The third and final category of cases in which abstention might be appropriate is those cases "where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings . . . directed at obtaining the closure of places exhibiting obscene films, or collection of state taxes." *Id.* at 816, 96 S. Ct. at 1245-46. This clearly is not a case involving restraint of a state criminal proceeding, nor does it involve a nuisance closing of a place due to obscenity. See *id.* Further, the issue of taxation of the property by the state was resolved in Sherrill. See 125 S. Ct. at 1494 (Souter, J., concurring) (reiterating the majority's holding that the

Nation "is not now immune from the taxing authority of local government"). Accordingly, this case does not fit within the third and final category of cases to which the doctrine of abstention applies. See *Colorado River*, 424 U.S. at 816-17, 96 S. Ct. at 1246.

b. Jurisdiction

Although the doctrine of abstention is not applicable in the present case, other principles grounded in judicial efficiency "govern in situations involving the contemporaneous exercise of concurrent jurisdictions." *Id.* at 817, 96 S. Ct. at 1246. "Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* (quoting *McClellan v. Carland*, 217 U.S. 268, 282, 54 L. Ed. 762, 30 S. Ct. 501, 505 (1910)). Federal district courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Id.* Thus, circumstances in which a federal court action should be dismissed for reasons of judicial efficiency in the face of a concurrent state court proceeding are "considerably more limited than the circumstances appropriate for abstention." *Id.* at 818, 96 S. Ct. at 1246.

In considering whether dismissal for reasons of judicial efficiency is appropriate when there is concurrent jurisdiction in a state court, factors such as "the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums" may be assessed. *Id.*, 96 S. Ct.

at 1247 (internal citations omitted). A court must carefully consider "both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise" when determining whether to dismiss the case. *Id.* No single factor is determinative, and "only the clearest of justifications will warrant dismissal." *Id.* at 818-19, 96 S. Ct. at 1247.

Here there is no inconvenience in continuing to proceed with this federal court action. The action has been pending since March 30, 2000. Proceedings have occurred over the five-plus years of its pendency. While state court proceedings were also initiated some years ago, they were held in abeyance at the choice of the parties pending resolution in this and the related Sherrill cases. Thus, avoiding piecemeal litigation will be furthered by maintaining the proceedings here. Moreover, although a state court proceeding was initiated in 1999 (as well as those initiated in later years), the order in which jurisdiction was obtained does not favor dismissal of the federal court action since the first-filed state court action was held in abeyance pending resolution of this matter. In short, there are no factors "counseling against the exercise" of federal jurisdiction in this action. See *id.* at 818-19, 96 S. Ct. at 1247. There is no clear justification warranting dismissal. *See id*. at 819, 96 S. Ct. at 1247.

The only other circumstance in which it would be appropriate to dismiss the federal court action based upon considerations of judicial administration would be where the court in the concurrent actions must exercise jurisdiction over the same property. *Id.* at 818, 96 S. Ct.

at 1246 (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412, 12 L. Ed. 2d 409, 84 S. Ct. 1579, 1582 (1964)). In that instance, the "state or federal court having custody of such property has exclusive jurisdiction to proceed." *Donovan*, 377 U.S. at 412, 84 S. Ct. at 1582 (citing *Princess Lida v. Thompson*, 305 U.S. 456, 465-68, 83 L. Ed. 285, 59 S. Ct. 275, 281 (1939)).

Thus, once a state court has taken jurisdiction of the res that is the subject of a state court in rem proceeding, a federal court cannot also exercise jurisdiction of the res. *Donovan*, 377 U.S. at 412, 84 S. Ct. at 1582; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229, 43 S. Ct. 79, 81, 67 L. Ed. 2d 226 (1922). The converse is also true. *Kline*, 260 U.S. at 229, 43 S. Ct. at 81. However, this "first-filed" rule is applicable only to in rem proceedings and is not applicable to in personam actions. *Donovan*, 377 U.S. at 412, 84 S. Ct. at 1582; *Kline*, 260 U.S. at 230, 235, 43 S. Ct. at 81, 83. This is so because although a state and federal court may have concurrent jurisdiction, "both courts cannot possess or control the same thing at the same time." *Kline*, 260 U.S. at 235, 43 S. Ct. at 83. Based upon this principle, the rule of comity developed prudentially limiting exercise of "in rem jurisdiction over a res that is already under the in rem jurisdiction of another court." *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989) (citing *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195, 79 L. Ed. 850, 55 S. Ct. 386, 389 (1935)). In other words, prior assumption of jurisdiction over a res by a state court creates an exceptional circumstance in which it may be proper for a federal court to decline to exercise its jurisdiction, as set forth in Colorado River. See *Moses*

H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19, 74 L. Ed. 2d 765, 103 S. Ct. 927, 938-39 (1983) (applying Colorado River to the facts of the case to find that no exceptional circumstances justified staying the federal action).

Here, the state court proceeding is an in rem foreclosure action. However, this federal court proceeding is in personam. This in personam action in federal court is not foreclosed by the state court in rem proceeding. See *York Hunter Constr. v. Avalon Props., Inc.*, 104 F. Supp. 2d 211, 215 (S.D.N.Y. 2000) (restating Second Circuit law "that federal district courts may adjudicate matters that indirectly relate to the state's exercise of in rem jurisdiction" and the state court must follow the federal court's adjudication regarding the rights at issue); *United States v. $ 3,000,000 Obligation of Qatar Nat'l Bank*, 810 F. Supp. 116, 118 (S.D.N.Y. 1993) (citing and quoting *Fischer v. American United Life Ins. Co.*, 314 U.S. 549, 554, 86 L. Ed. 444, 62 S. Ct. 380, 383 (1942) for the proposition that "a state or federal court 'may properly adjudicate rights in property in possession' of another court").

Based upon the foregoing, this action need not be dismissed based upon the doctrine of abstention or because there is a state court in rem proceeding.

2. Motion and Cross-motion for Summary Judgment

The Nation propounds three bases upon which it is entitled to summary judgment for injunctive and

declaratory relief. The County relies upon Sherrill in opposition to the Nation's motion and on behalf of its cross-motion for summary judgment. The following analysis demonstrates that there are four independent bases supporting summary judgment in favor of the Nation: the Nonintercourse Act, Tribal sovereign immunity, due process, and state law.

a. Nonintercourse Act, 25 U.S.C. § 177

Section 177 of Title 25 of the United States Code prohibits the "purchase, grant, lease, or other conveyance" of land from "any Indian nation or tribe of Indians" unless it is pursuant to a "treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. In other words, land owned by an Indian nation is inalienable (except with the approval of Congress, a circumstance not present here). See *id.* Proceeding with the state court foreclosure would result in the transfer of title to land owned by the Nation to the County—alienation of Indian land. This is precisely what is prohibited by the Nonintercourse Act.

The County addresses the Nonintercourse Act only in a footnote in its memorandum. It contends that the Nation advanced the Nonintercourse Act argument before the Supreme Court in Sherrill but was unsuccessful. The County suggests that by its holding that the Nation is precluded by equitable principles from the remedy of tax immunity, the Supreme Court rejected the Nonintercourse Act argument. However, nothing in Sherrill explicitly or implicitly rejects the validity of the Nonintercourse Act

or its applicability with regard to the land in question. The Court acknowledged that the Nonintercourse Act restricts the alienation of Indian land without Congressional approval. *See* 125 S. Ct. at 1484 & n.2 (stating that "the Act bars sales of tribal land without the acquiescence of the Federal Government"). The Court also discussed the history of claims relating to illegal dispossession of land from the Indians in this region, all based upon a violation of the Nonintercourse Act. See *id.* at 1486-89. In each action discussed the Indians were successful in their claim for some sort of recompense for the wrongful dispossession, with a single exception. *Id.* That exception pertained to lands ceded to New York State under treaties in 1785 and 1788, under the Articles of Confederation, id. at 1488 n.4, prior to passage of the first Nonintercourse Act in 1790. The lack of success on that claim was not attributable to inapplicability of the Nonintercourse Act.

The Supreme Court in Sherrill simply foreclosed the Nation from obtaining the remedy of immunity from taxes. *Id*. at 1494. It noted, in response to the dissent's suggestion that tax immunity could be asserted defensively, that the "equitable cast of the relief sought remains the same whether asserted affirmatively or defensively." *Id.* at 1489 n.7. This does not address the issue of alienability. It merely suggests that the Nation is foreclosed from asserting immunity from taxes as a defense. See *id.*

The Nonintercourse Act, in plain language, prohibits the conveyance of lands from any Indian nation. The foreclosure sought by the County would be a conveyance of lands from the Nation. Accordingly, the foreclosure is prohibited by the Nonintercourse Act.

Similarly, the finding that the land is taxable does not mean that it is subject to foreclosure. Implicit permission to foreclose as read into the Sherrill decision by the County is simply insufficient to authorize such a drastic remedy.

Just as the Nation is precluded from its chosen remedy—tax immunity, so is the County precluded from its chosen remedy—foreclosure. The former preclusion is derived from "standards of federal Indian law and federal equity practice" that "evoke the doctrines of laches, acquiescence, and impossibility." *Id.* at 1489-90, 1494. The latter preclusion is derived from a federal statute, the meaning of which is clear and unambiguous. See 25 U.S.C. § 177. While it has been and will be said that it is unfair and will work a hardship on the citizens of the County to preclude the remedy of foreclosure, so too some will say that it is unfair to the members of the Nation whose tens of thousands of acres of land were illegally taken from them to preclude their tax immunity remedy.

b. Tribal Sovereign Immunity

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905, 909 (1991) (quoting *Cherokee Nation v. Georgia*, [30 U.S. 1], 5 Pet. 1, 17, 8 L. Ed. 25 (1831)). Accordingly, sovereign immunity bars suits against Indian tribes unless the tribe has clearly waived its immunity or the immunity has been abrogated by Congress. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58,

56 L. Ed. 2d 106, 98 S. Ct. 1670, 1677 (1978)). Further, "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Id.* (citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513, 84 L. Ed. 894, 60 S. Ct. 653, 656 (1940)).

The Nation is a federally recognized Indian tribe. The Nation has not waived its sovereign immunity with regard to its real property. Nor has Congress abrogated the Nation's immunity regarding the property it owns. More generally, "Congress has never authorized suits [against Indian tribes] to enforce tax assessments," although it "has occasionally authorized limited classes of suits." *Id.* at 510, 111 S. Ct. at 910. Thus, sovereign immunity bars suits against the Nation. *See id.* at 509, 111 S. Ct. at 909.

The County argues that Potawatomi is inapposite because that was an in personam suit against the tribe, while the tax foreclosure suit here is in rem. It is of no moment that the state foreclosure suit at issue here is in rem. What is relevant is that the County is attempting to bring suit against the Nation. The County cannot circumvent Tribal sovereign immunity by characterizing the suit as in rem, when it is, in actuality, a suit to take the tribe's property. *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 755, 140 L. Ed. 2d 981, 118 S. Ct. 1700, 1703 (1998) (explaining its holding in Potawatomi that Indian tribes are immune from suit to collect unpaid taxes, stating: "a difference [exists] between the right to demand compliance with state laws and the

means available to enforce them"); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 38, 117 L. Ed. 2d 181, 112 S. Ct. 1011, 1017 (1992) (rejecting the suggestion that there is any "in rem exception to the sovereign-immunity bar" in the context of a state's Eleventh Amendment sovereign immunity); *French v. Georgia Dep't of Revenue (In re ABEPP Acquisition Corp.)*, 215 B.R. 513, 516-17 (B.A.P. 6th Cir. 1997) (applying Nordic Village to reject the suggestion that the "bankruptcy court could burrow past" Eleventh Amendment immunity "by exercising in rem jurisdiction").

The County also contends that Potawatomi is inapposite because the sales of cigarettes at issue there occurred on land held in trust for the Potawatomis, whereas here, the properties are not reservation land. The County's assertion that the properties are not reservation land is based upon its interpretation of Sherrill. Even if the County's assertion were correct, it misapprehends Potawatomi. There Oklahoma argued that because the cigarette sales occurred on trust land rather than reservation land the normal rules of sovereign immunity should not apply. *Potawatomi*, 498 U.S. at 511, 111 S. Ct. at 910. The Court in Potawatomi refused to distinguish between trust land and reservation land. Id. The Court further noted that a case involving a ski resort operated by an Indian Tribe outside of a reservation was not to the contrary. *Id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1978)). In Mescalero the Court found that, in the absence of contrary federal law, the operation of the ski resort outside of the reservation was "held subject to nondiscriminatory state law otherwise applicable to all

citizens of the State." *Id.* (citing *Mescalero*, 411 U.S. at 148-49, 93 S. Ct. at 1270). Additionally, in Kiowa Tribe, the Court distinguished application of state substantive laws regarding off-reservation conduct with tribal immunity from suit. 523 U.S. at 755, 118 S. Ct. at 1703. The Court held that the Kiowa Tribe was immune from a suit for breach of contract regardless of "whether those contracts involved governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760, 118 S. Ct. at 1705.

It is also notable that the Potawatomi Court rejected, on sovereign immunity grounds, Oklahoma's countersuit to enforce its $2.7 million claim for taxes assessed on the sale of cigarettes which the Tribe failed to pay. See *Potawatomi*, 498 U.S. at 507-09, 111 S. Ct. at 908-09. The Court also rejected Oklahoma's complaints that although it had a right (to assess a tax on sales of cigarettes to non-Indians) it had no remedy if the Tribe had sovereign immunity. *Id.* at 514, 111 S. Ct. at 912. The Court noted that although sovereign immunity might bar Oklahoma from the most efficient remedy, other remedies, such as an "agreement[] with the tribes to adopt a mutually satisfactory regime for the collection of" the tax, were available. *Id.*

As a subset of its claim that tribal sovereign immunity precludes the state tax foreclosure suit, the Nation contends that it is not subject to the imposition of penalties and interest, which amount to a state law fine against it. The County makes no argument in this regard. Therefore, it must be concluded that the County agrees that the imposition of penalties and interest was improper.

c. Due Process

It is a requirement of due process that a property owner be properly notified of a tax sale and redemption period. *City of Sherrill*, 145 F. Supp. 2d at 257 (citing *McCann v. Scaduto*, 71 N.Y.2d 164, 180, 519 N.E.2d 309, 524 N.Y.S.2d 398 (N.Y. Ct. App. 1987); *Yagan v. Bernardi*, 256 A.D.2d 1225, 1226, 684 N.Y.S.2d 117 (N.Y. App. Div. 4th Dep't 1998)). The time periods set forth in the regulatory scheme must be followed; shorter notice violates due process. *Id.* New York has a two-year general redemption period. N.Y. Real Prop. Tax Law § 1110 (McKinney 2000). The parties have not pointed out any different redemption period set by the County. Thus, in order to comport with due process the County must have given the Nation notice two years prior to expiration of the redemption period. *See City of Sherrill*, 145 F. Supp. 2d at 257.

The County first notified the Nation of the March 31, 2005, expiration of the redemption period on December 8, 2004. This is far less than the two years required to comport with due process. Additionally, at the time the notice was sent out the case law of this circuit held that these properties, reacquired by the Nation and within its reservation, were exempt from taxation. It was not until the Supreme Court decision of March 29, 2005, that the law changed making the properties taxable. Subsequently, the County extended the redemption period to June 3, 2005. Even considering the concededly earliest notification on December 8, 2004, and the latest expiration of the redemption period of June 3, 2005, the County falls short of the two-year period required for notice by approximately

eighteen months. Thus, the County failed to give timely notice of the redemption period expiration to the Nation, a due process violation.

The County relies upon *Akey v. Clinton County, N.Y.*, 375 F.3d 231 (2d Cir. 2004), in support of its position that notice to the Nation comported with due process. This reliance is untenable. The issue before the Akey Court was whether the means selected to make the notifications comported with due process. *Id.* at 235. The court stated that notice by mail, reasonably calculated to be received by the property owners, is sufficient to constitute due process. *Id*. In Akey, the question raised was whether the County's notice was reasonably calculated to reach the property owners given, for example, failure to do a complete search of public records to find an updated address after a notice of foreclosure was returned as undeliverable. *Id.* at 236. The timing of the notices was not in issue.

d. State Law

New York State Law provides that "real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation. "N.Y. Real Prop. Tax Law § 454; N.Y. Indian Law § 6 (McKinney 2001) (directing that no taxes be assessed upon Indian reservation lands). The Nation's "reservation was not disestablished." *City of Sherrill*, 337 F.3d at 167. The properties at issue are located within the Nation's reservation. Pursuant to state law, taxes should not have been assessed against the Nation's properties and such properties are exempt from taxation. Therefore, the

County's assessment of taxes upon the property and its attempts to foreclose for non-payment of such taxes is contrary to state law.

The County argues that relying upon the Second Circuit's holding that the reservation was not disestablished is contrary to the Supreme Court decision is Sherrill. The Supreme Court focused its decision on the requested remedy-tax immunity. See *Sherrill*, 125 S. Ct. at 1490 n.9. It explicitly declined to decide whether the Second Circuit erred in determining that the reservation was not disestablished. *Id.* Thus, the Second Circuit holding that the reservation was not disestablished remains undisturbed. Further, the Supreme Court's determination that federal equitable principles prevent the Nation from obtaining its requested remedy of tax immunity necessarily was predicated upon an assumption that the reservation was not disestablished. This is so because if the reservation was disestablished the lands would not be Indian Country and clearly would be subject to taxation. Under such circumstances the Supreme Court would not have needed to rely upon the equitable principles of laches, acquiescence, and impossibility to find the properties were subject to local taxation.

In sum, the Nation is entitled to summary judgment based upon each of the foregoing four separate and distinct reasons. The County is not entitled to summary judgment on its cross-motion.

3. Injunctive and Declaratory Relief

A party seeking injunctive relief must establish the inadequacy of any remedy at law and irreparable harm. *Northern Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1307, 83 L. Ed. 2d 388, 105 S. Ct. 459, 460 (1984); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68 (2d Cir. 1999). In determining whether to exercise its discretion and grant equitable relief, a court must "weigh[ ] the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title*, 173 F.3d at 68 (citing *Yakus v. United States*, 321 U.S. 414, 440, 88 L. Ed. 834, 64 S. Ct. 660, 675 (1944)).

Here, it is clear that any remedy at law would be inadequate and irreparable harm would result if an injunction is not issued precluding the County from foreclosing on the Nation's properties. Monetary damages would be insufficient to remedy a foreclosure and change of title of the Nation's properties. Indeed, the Nation requested only injunctive and declaratory relief, not monetary relief. Additionally, the Nation would be irreparably harmed by the foreclosure and change of title of its properties. Finally, granting an injunction would mean that the County's remedy for the non-payment of taxes by the Nation would exclude foreclosure. Limitation of enforcement remedies is insufficient to justify overriding Tribal sovereign immunity. *See, e.g. Kiowa Tribe*, 523 U.S. at 755, 118 S. Ct. at 1703 (holding that although the state may tax sales to non-Indians, the Tribe was immune from a suit to collect such taxes). Thus, a balance of the hardships weighs in favor of granting the injunction.

The Nation also seeks a declaration that its reservation was not disestablished. Given the Supreme Court determination that it need not review the Second Circuit's conclusion in this regard, 125 S. Ct. at 1490 n.9, the Second Circuit's holding that the reservation was not disestablished, 337 F.3d at 167, remains good law. Accordingly, the Nation is entitled to a declaration that its reservation was not disestablished.

V. CONCLUSION

The remedy of foreclosure is not available to the County. First, under the Nonintercourse Act, the Nation's properties are inalienable. Second, the Nation is immune from suit to collect unpaid property taxes. Third, the notice provided to the Nation of the date the redemption period expired failed to comport with due process because it was significantly shorter than two years. Fourth, the Second Circuit finding that the Nation's reservation was not disestablished was not abrogated by Sherrill and New York State law exempts reservation land from taxation. As a result, the Nation is entitled to the injunctive and declaratory relief it seeks.

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.

There is a vast difference between requiring real property owned by a sovereign nation to be taxed and to comply with local zoning and land use regulations, and

allowing ownership of real property to be seized from that sovereign nation. The seizing of land owned by a sovereign nation strikes directly at the very heart of that nation's sovereignty. In the face of Federal and State laws and the solemn treaty obligations of the United States, permitting the seizure of lands from a sovereign nation should require, at the very least, a specific Act of Congress.

This is obviously not the last word. There will undoubtedly be an appeal to the Second Circuit, and perhaps to the Supreme Court.[3] However, unless directed otherwise by legislation or judicial mandate, the seizure of land from a sovereign, against its will, will not occur as the result of a ruling from this forum.

Therefore, it is

ORDERED that

1. Madison County's motion to dismiss is DENIED;

2. Oneida Indian Nation's motion for summary judgment is GRANTED;

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3. As in the Sherrill case, there is always the possibility of a settlement agreement between the parties. This would, of course, be the best final result. However, a settlement would require a spirit of cooperation and compromise on the part of both sides which heretofore has appeared to be sorely lacking. See 145 F. Supp. 2d at 231. Otherwise this and other federal and state litigation will continue into the indefinite future.

3. Madison County's cross motion for summary judgment is DENIED;

4. Madison County is permanently enjoined from any attempt to foreclose on Oneida Nation property or in any other way alter title to Oneida Indian Nation property;

5. Madison County is permanently enjoined from assessing and/or collecting penalties and interest on unpaid taxes against the Oneida Indian Nation; and

6. Oneida Indian Nation's reservation was not disestablished.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

DAVID N. HURD

United States District Judge

Dated: October 27, 2005

Utica, New York.

APPENDIX F — ORDER DENYING PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 16, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Numbers: 05-6408-cv (L)
06-5168-cv (Con)
06-5515-cv (Con)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of August, two thousand twelve,

Oneida Indian Nation of New York,

Plaintiff-Counter-Defendant-Appellee,

v

Madison County and Oneida County, New York,

Defendants-Counter-Claimants-Appellants,

Stockbridge-Munsee Community,
Band of Mohican Indians,

Putative Intervenor-Appellant.

Appendix F

ORDER

Appellants Madison County and Oneida County, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe, Clerk

APPENDIX G — 1788 TREATY OF FORT SCHUYLER, SEPTEMBER 22, 1788

1788 TREATY OF FORT SCHUYLER, SEPTEMBER 22, 1788

STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indiana called the Oneidas – it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, the Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly, of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the Said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly pounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner 6' of last mentioned tract; thence due south until it intersects a due west line from the bead of the Tianaderha or Unadilla

River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lauds along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each

side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lauds to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indiana (now settled at Brothertown under the pastoral care of the Rev. Samson Occom and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indiana, and a tract of six miles square for the Stockbridge Indiana.

Thirdly, in consideration of the Raid Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist milt and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of

June in every year at Fort Schuyler aforesaid six hundred dollars in silver, but it the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid and as a further consideration to the Oneidas the people of the State of New York shall grant to the Raid John Francis Perache a tract of land, beginning in the line of property at it certain cedar tree near the road leading to Oneida and runs from the Raid cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George IV. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the Raid ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly, the people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation, and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said state, for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the Raid State be aiding to the people of the State of New York in removing all such intruders and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation its the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA

* * * *

APPENDIX H — 1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

Preamble of the Canandaigua Treaty

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations:

The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems and warriors of the Six Nations in general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations . . . .

ARTICLE 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb

them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3. The land of the Seneca Nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh Creek, at Johnson's Landing Place, about four miles eastward, from the fort of Niagara; then southerly, up that creek to its main fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh Creek, to the river Niagara, above Fort Schlosser, being the eastern boundry of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain, at the treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the Niagara River to Lake Erie, to the northwest corner of a triangular piece of land, which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on the Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca 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.

ARTICLE 4. The United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, not 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.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of traveling and transportation. And the Six Nations and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes, where necessary, for their safety.

ARTICLE 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with

humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed to them by an article ratified by the President, on the twenty-third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be expended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils, suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of

the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve or peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for that purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident.

IN WITNESS WHEREOF, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, in the eleventh day of November, in the year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING

Witnesses
Interpreters
Israel Chapin Horatio Jones
Wm. Shepard Jun'r Joseph Smith
James Smedley Jasper Parrish
John Wickham Henry Abeele
Augustus Porter
James H. Garnsey

Appendix H

Wm. Ewing
Israel Chapin, Jun'r

(Signed by fifty-nine Sachems and War Chiefs of the Six Nations.)

CANANDAIGUA, NEW YORK – NOVEMBER 11, 1797

Native American Name English Translation
Handsome Lake
Capt. Key
Woods On Fire
Fish Carrier
Farmer's Brother or Nicholas Kusick
Red Jacket
Two Skies Of A Length
Broken Axe
Open The Way or Handsome Lake
Heap Of Dogs
Half Town or Jake Stroud
Stinking Fish
Capt. Prantup or Cornplanter
Green Grasshopper or Big Sky or Little Billy

* * * *

APPENDIX I — 1838 TREATY OF BUFFALO CREEK, JANUARY 15, 1838

1838 TREATY OF BUFFALO CREEK, JANUARY 15, 1838

Articles of a treaty made and concluded at Buffalo Creek in the State of New York, the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, head men and warriors of the several tribes of New York Indians assembled in council witnesseth:

WHEREAS, the six nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force, and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were

made by the New York Indians from the Menomonie and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonie Indians, concluded in February, 1831, to which the New York Indians gave their assent on the seventeenth day of October 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe: And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined to carry out the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

GENERAL PROVISIONS.

ARTICLE 1.

The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line, northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

ARTICLE 2.

In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in

order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for

all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

ARTICLE 3.

It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

ARTICLE 4.

Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to

the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

ARTICLE 5.

The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

ARTICLE 6.

It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

ARTICLE 7.

It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

Appendix I

ARTICLE 8.

It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

SPECIAL PROVISIONS FOR THE ST. REGIS.

ARTICLE 9.

It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for monies laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be aportioned out to the several claimants by the chiefs of the said party and a United States' Commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazor Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox River thirteen chains above the old milldam at the rapids of the Little Kockalin;

thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east, two hundred chains, thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECAS.

ARTICLE 10.

It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred

and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows: the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

ARTICLE 11.

The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

Appendix I

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

ARTICLE 12.

The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing west, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said Onondagas, on their removal to their new homes in the west, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

ARTICLE 13.

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

Appendix I

SPECIAL PROVISIONS FOR THE TUSCARORAS.

ARTICLE 14.

The Tuscarora nation agree to accept the country set apart for them in the Indian territory, and to remove there within five years, and continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns, in fee simple, five thousand acres of land, lying in Niagara county, in the State of New York which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes, annually; and the money which shall be received for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be

appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant and William Chew, or the survivor, or survivor of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest, and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

ARTICLE 15.

The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the direction of the President of the United States, in such proportions, as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education,

and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

R. H. Gillet, Commissioner.

Senecas:
Little Johnson,
Daniel Twoguns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,
Job Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jameson,

George Big Deer,
Samuel Gordon,
Thompson S. Harris,
George Jimeson,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones,
George White, by his agent White Seneca,
Walter Thompson, by his agent Daniel Twoguns,
Long John,
John Bark,
George Lindsay,
Jacob Bennet,
John Bennet,
Seneca White,
Maris Pierce,
David White,
James Shongo,
William Cass,
Samuel Wilson,
John Seneca.
Tuscaroras:
Nicholas Cusick,
William Chew,
William Mt. Pleasant,
John Fox,
James Cusick,
John Patterson,

Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.
Oneidas residing in the State of New York, for themselves and their parties:
Baptiste Powlis,
Jonathan Jordan.
Oneidas at Green Bay:
John Anthony,
Honjoit Smith,
Henry Jordan,
Thomas King.
St. Regis:
Eleazer Williams, chief and agent.
Oneidas residing on the Seneca Reservation:
Silversmith, (For himself and in behalf of his nation.)
William Jacket,
Button George.
Principal Onondaga Warriors, in behalf of themselves and the Onondaga Warriors:
William John,
Noah Silversmith.
Cayugas:
King William,
James Young,
Jack Wheelbarrow,
Joseph Isaac, For themselves and in behalf of the nation.
Principal Cayuga Warriors, in behalf of themselves and the Cayuga Warriors:
John Crow,
Snow Darkness,

Jacob G. Seneca,
Ghastly Darkness,
Thomas Crow,
Peter Wilson,
Jonathan White,
Harvey Rowe,
David Crow,
George Wheeler,
Simon Isaac,
Joseph Peter,
Jacob Jackson.

Witnesses:
James Stryker, Sub-agent, Six Nations, New York Indians.
Nathaniel T. Strong, United States' Interpreter, New York agency.
H. B. Potter.
Orlando Allen.
H. P. Wilcox.
Charles H. Allen.
Horatio Jones.
Spencer H. Cone.
W. W. Jones.
J. F. Schermerhorn.
Josiah Trowbridge.
(To the Indian names are subjoined a mark and seal.)

Appendix I

SCHEDULE A.

CENSUS OF THE NEW YORK INDIANS AS TAKEN IN 1837.
Number residing on the Seneca reservations.

Senecas 2,309
Onondagas 194
Cayugas 130
2,633
Onondagas, at Onondaga 300
Tuscaroras 273
St. Regis, in New York 350
Oneidas, at Green Bay 600
Oneidas, in New York 620
Stockbridges 217
Munsees 132
Brothertowns 360

The above was made before the execution of the treaty. R. H. Gillet, Commissioner.

SCHEDULE B.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty:
To Jonathan Printess, ninety-three dollars.
To William Chew, one hundred and fifteen dollars.
To John Patterson, forty-six dollars.
To William Mountpleasant, one hundred and seventy-one dollars.

To James Cusick, one hundred and twenty-five dollars.
To David Peter, fifty dollars.
The rest and residue thereof is to be paid to the nation.

The above was agreed to before the execution of the treaty.
R. H. Gillet, Commissioner.

SCHEDULE C.

Schedule applicable to the Onondagas and Cayugas residing on the Seneca reservations. It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, any thing therein to the contrary notwithstanding.

To William King, one thousand five hundred dollars.
Joseph Isaacs, seven hundred dollars.
Jack Wheelbarrow, three hundred dollars.
Silversmith, one thousand dollars.
William Jacket, five hundred dollars.
Buton George, five hundred dollars.

The above was agreed to before the treaty was finally executed.
R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under the authority of the United States of America, at Buffalo Creek in the county of Erie, and

State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next hereinafter set forth, and at the price or sum therein specified, as the consideration, or purchase money for such sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph

Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract, or parcel of land situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and being partly in said county of Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and

are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and every of the said tracts or parcels of land belonging or appertaining; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof: to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof forever, as joint tenants, and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

Little Johnson,
Daniel Two Guns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,

George Bennet,
John Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jimeson,
Samuel Gordon,
Thompson S. Harris,
George Jemison,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones.

I have attended a treaty of the Seneca Nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed, in my presence, by the chiefs of the Seneca Nation, being fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

Appendix I

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in and to the tract, piece, or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the consideration or purchase money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs, and warriors of the

Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars, to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges, heraditaments, and appurtenances to the said tract or parcel of land belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part, and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof forever, as joint tenants and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same

tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals, the day and year first above written.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Sealed and delivered in presence of—

James Stryker.
R. H. Gillet.
Charles H. Allen.
J. F. Schermerhorn.
Nathaniel T. Strong, U. S. interpreter.
H. B. Potter.
Orlando Allen.
(To the Indian names are subjoined a mark and seal.)

At the abovementioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing

instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.

Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. Trowbridge, Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned and declared to be done to their full satisfaction. I do therefore certify and approve the same.

R. H. Gillet, Commissioner.
Feb. 13, 1838.

7 Stat., 561.

Supplemented article to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February 1838.

Appendix I

Supplemental article to the treaty concluded at Buffalo Creek in the State of New York, dated January 15, 1838.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on that part of the United States, and he having fully and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars, part of the sum of five thousand dollars mentioned in the special provisions for the St. Regis Indians, any thing in the article contained to the contrary notwithstanding.

Done at the council house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight. Witness our hands and seals.

R. H. Gillet, Commissioner.
Lover-taie-enve,
Louis-taio-rorio-te,
Michael Gaveault,

Lose-sori-sosane,
Louis-tioonsate,
Jok-ta-nen-shi-sa,
Ermoise-gana-saien-to,
Tomos-tataste,
Tier-te-gonotas-en,
Tier-sokoia-ni-saks,
Sa-satis-otsi-tsia-ta-gen,
Tier-sgane-kor-hapse-e,
Ennios-anas-ota-ka,
Louis-te-ganota-to-ro,
Wise-atia-taronne,
Tomas-outa-gosa,
Sose-te-gaomsshke,
Louis-orisake-wha,
Sosatis-atis-tsiaks,
Tier-anasaken-rat,
Louis-tar-oria-keshon,
Jasen-karato-on.

The foregoing was executed in our presence—

A. K. Williams, Agent on the part of New York for St. Regis Indians.
W. L. Gray, Interpreter.
Owen C. Donnelly.
Say Saree.
(To the Indian names are subjoined a mark and seal.)

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as

amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract therewith, the same having been submitted to us by Ransom H. Gillet, a Commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28, 1838.

Captain Pollard,
Captain Strong,
White Seneca,
Blue Eyes,
George Bennett,
Job Pierce,
Tommy Jimmy,
William Johnson,
Reuben Pierce,
Morris Halftown,
Levi Halftown,
George Big Deer,
Jim Jonas,
George Jimeson,
Thomas Jimeson,
George Fox,
N. T. Strong,
Thompson S. Harris,
Samuel Gordon,
Jacob Jimeson,
John Gordon,
Tall Peter,
Billy Shanks,

James Stevenson,
Walter Thompson,
John Bennett,
John Seneca,
John General,
Major Jack Berry,
John Tall Chief,
Jabez Stevenson.
(To the Indian names are subjoined marks.)

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. Gillet, Commissioner.

Witness:
H. A. S. Dearborn, Superintendent of Massachusetts.
James Stryker, U. S. Agent.
Little Johnson,
Samuel Wilson,
John Buck,
William Cass,
Long John,
Sky Carrier,
Charles Greybeard,
John Hutchinson,
Charles F. Pierce,
John Snow.
(To the Indian names are subjoined marks.)

These ten chiefs signed in my presence except the last John Snow.

H. A. S. Dearborn,
Superintendent of Massachusetts.

Signed in presence of –
Nathl. T. Strong, U. S. Interpreter.
James Stryker, U. S. Agent.
George Kenququide, by his attorneys.
N. T. Strong.
White Seneca.

The signature of George Kenququide was added by his attorneys in our presence.

R. H. Gillet,
James Stryker.

18th January 1839.

We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 9th, 1838 at the Oneida Council House.

Executed in the presence of—
Timothy Jenkins.

Appendix I

First Christian Party:
Baptista Powlis,
Anthony Big Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
Isaac Wheelock,
Thomas Doxtater,
William Hill,
Baptiste Denny.
Orchard Party:
Jonathan Jordon,
Thomas Scanado,
Henry Jordon,
William Day.
Second Christian Party:
Abraham Denny,
Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny.
(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. Gillet, Commissioner, &c.

We the undersigned sachems, chiefs and head men of the Tuscarora nation of Indians residing in the State of New

York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 14th, 1838.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Patterson,
Matthew Jack,
George L. Printup,
James Cusick,
Jonathan Printup,
Mark Jack,
Samuel Jacobs.

Executed in presence of—
J. S. Buckingham,
D. Judson,
Leceister S. Buckingham,
Orlando Allen.
(To the Indian names are subjoined marks.)

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. Gillet, Commissioner.

Appendix I

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 30th, 1838.

Thomas Crow,
John Crow,
Ghastly Darkness,
Jacob G. Seneca.

Executed in presence of—
James Young.
(To the Indian names are subjoined marks.)

The above four signatures were freely given in our presence.

R H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a

commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled. The St. Regis Indians shall not be compelled to remove under the treaty or amendments.

Dated October 9th, 1838.

Lorenn-taie-enne,
Sase-sori-hogane,
Louis-taw-roniate,
Thomas-talsete,
Saro-sako-ha-gi-tha,
Louis-te-ka-nota-tiron,
Michael Gareault,
W. L. Gray, Int.
Louis-tio-on-sate,
Tier-ana-sa-ker-rat,
Tomas-ska-en-to-gane,
Tier-sa-ko-eni-saks,
Saro-tsio-her-is-en,
Sak-tho-te-ras-en,
Saro-saion-gese,
Louis-onia-rak-ete,
Louis-aion-gahes,
Sak-tha-nen-ris-hon,
Sa-ga-tis-ania-ta-ri-co,
Louis-sa-ka-na-tie,
Sa-ga-tis-asi-kgar-a-tha,
Simon-sa-he-rese,
Resis-tsis-kako,
Ennias-kar-igiio,
Sak-tsior-ak-gisen,

Tier-kaien-take-ron,
Kor-ari-hata-ko,
Tomas-te-gaki-gasen,
Saro-thar-on-ka-tha,
Ennias-anas-ota-ko,
Wishe-te-ka-nia-tasoken,
Tomas-tio-nata-kgente,
wishe-aten-en-rahes,
Tomas-ioha-hiio,
Ennias-kana-gaien-ton,
Louis-taro-nia-ke-thon,
Louis-ari-ga-ke-wha,
Sak-tsio-ri-te-ha,
Louis-te-ga-ti-rhon,
Tier-atsi-non-gis-aks.

The foregoing assent was signed in our presence.

R. H. Gillet, Commissioner.

Witnesses:
James B. Spencer.
Heman W. Tucker.
A. K. Williams, Agent St. Regis Indians.
Frs. Marcoux Dictre.
(To the Indian names are subjoined marks.)

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh

day of June, 1838, the same having been submitted to us, by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 31st, 1838.

Silversmith,
Noah Silversmith,
William Jacket.

(To the Indian names are subjoined marks.)

The above signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.