No. 10-72

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*") this Court held that standards of federal Indian law and federal equity practice precluded the Oneida Indian Nation of New York ("OIN"), the same tribe here, from unilaterally reviving its ancient sovereignty, in whole or in part, over recently-purchased property that had been owned and governed by non-Indians for 200 years. In so holding, this Court expressly rejected the tribe's claim that its sovereign immunity prevented the City of Sherrill in Oneida County, New York, from collecting unpaid property taxes through foreclosure and eviction. Despite *Sherrill*, in these two related cases involving attempts by Madison County and Oneida County to foreclose on OIN-owned fee parcels for nonpayment of lawfully imposed taxes, the lower court held that the remedy of foreclosure is barred by tribal sovereign immunity from suit—a decision which two court of appeals judges expressly (and the third, in effect) implored this Court to review.

The questions presented in this case are:

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.*

2. whether the ancient Oneida reservation in New York has been disestablished or diminished.

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* On November 30, 2010, just before this brief was due and ten years into this litigation, Petitioners' counsel received a letter advising that OIN has purported to "waive" its sovereign immunity from suit as to real property taxes. Petitioners' counsel responded to that letter on December 1, 2010. The parties also submitted letters on December 2, 2010.

PARTIES TO THE PROCEEDING

Petitioners are Madison County and Oneida County, New York. Respondent is the Oneida Indian Nation of New York. The Stockbridge-Munsee Community, Band of Mohican Indians is denominated a putative intervenor. 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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The opinion of the court of appeals is reported at 605 F.3d 149 (2d Cir. 2010), and appears in the Petitioners' Appendix ("Pet. App.") 1a to 33a. The two opinions of the district court, separately addressing the proceedings against Madison County and Oneida County, are reported at 401 F. Supp. 2d 219 (N.D.N.Y. 2005) and 432 F. Supp. 2d 285 (N.D.N.Y. 2006), respectively. Those opinions appear at Pet. App. 52a to 78a (Madison County) and Pet. App. 34a to 51a (Oneida County).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. The court of appeals had jurisdiction under 28 U.S.C. § 1291. The judgment of the court of appeals was entered April 27, 2010. Pet. App. 1a. The Petition for a writ of certiorari was filed July 9, 2010, and granted October 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

A. Tribal Immunity As Bar To 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 32a (Cabranes

and Hall, J.J., concurring); *see also id.* at 21a (equating self-contradictory rule adopted by court to a nonsensical nursery rhyme).[1] Applying that concededly illogical rule to the tax foreclosure proceedings commenced by the Petitioner Counties, the court of appeals affirmed injunctions preventing the Counties from foreclosing on recently-purchased parcels owned in fee by the Oneida Indian Nation of New York ("OIN"). It did so despite OIN's persistent refusal—in direct defiance of this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*")—to pay lawfully imposed property taxes.

A proper reading of this Court's decisions regarding Indian sovereignty and taxation supports a different and logical rule: taxing authorities that are empowered to assess and collect ad valorem property taxes on fee lands owned by an Indian tribe have the right to collect those taxes through foreclosure. Indeed, this Court's decision in *Sherrill* dictates that Madison and Oneida Counties have the right to foreclose on OIN-owned property for non-payment of property taxes, just as this Court concluded with respect to the City of Sherrill in Oneida County. No basis exists to distinguish the holding in *Sherrill*, where this Court upheld the right of the City to:

(1) impose ad valorem property taxes on OIN lands held in fee;

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1. 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.

(2) take title to those parcels through foreclosure for non-payment of the property taxes; and

(3) evict OIN after taking legal title to the property.

See 544 U.S. at 211, 214 n.7.

Here, the district court's twin injunctions, affirmed by the court of appeals, prevent either county from collecting delinquent property taxes through foreclosure, despite the holding in *Sherrill*.

The court of appeals' reading of *Sherrill* ignores: (1) the procedural posture of the tax collection and eviction proceedings in that case; (2) that OIN asserted tribal immunity from suit as a defense to the foreclosure and eviction proceedings; and (3) that this Court rejected any and all assertions of tribal sovereignty as a bar to the City of Sherrill's assessment and collection of property taxes. Specifically, in its opinion in *Sherrill*, this Court directly rejected Justice Stevens' lone dissenting view that tribal sovereignty prevents taxing authorities from collecting property taxes through foreclosure and eviction. *See id.* at 214 n.7.

The court of appeals' conclusion that the Counties are powerless to collect real property taxes owed by OIN rests on two fundamental legal misconceptions. The first involves the nature of the remedy of foreclosure. The second involves the nature of tribal sovereignty.

1. Limited Nature Of *In Rem* Foreclosure

Foreclosure is an *in rem* proceeding that culminates in a forced sale of the property (the *res*) to satisfy the

tax obligation. It is not a proceeding against the delinquent taxpayer and thus does not fall within any sovereign immunity prohibition concerning *in personam* lawsuits. This Court specifically drew a distinction between *in rem* and *in personam* proceedings in analyzing a claim of tribal immunity from suit in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"). There, this Court upheld Yakima County's right to assess and collect ad valorem property taxes on lands owned by the Yakima Nation or individual members of that tribe, noting that *in rem* tax collection proceedings are not significantly disruptive of tribal self-government. *See id.* at 265.

2. Limited Nature Of Tribal Sovereign Immunity

Tribes are "quasi-sovereigns" or "semi-sovereigns." The sovereign power that tribes do possess is "of a unique and limited character," *United States v. Wheeler*, 435 U.S. 313, 323 (1978), in keeping with their status as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Tribes do not possess the full territorial sovereignty of States or foreign countries even on Indian reservations. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, P.C., 476 U.S. 877, 890-91 (1986). And even as to internal tribal affairs, where tribes exercise their maximum sovereign authority over their members and their sovereign territory, tribal sovereignty is subject to total defeasance by Congress. *See Wheeler*, 435 U.S. at 323.

Even if tribes retain some element of tribal immunity from lawsuits, tribes do not enjoy greater immunity from suit than foreign countries or the fifty States. If a State chooses to purchase land located in another State, it is treated as a private citizen subject to the other State's jurisdiction, including laws respecting the assessment and collection of real property taxes. The same holds true for foreign nations. Except for real estate used for official consular purposes, every foreign nation that buys fee land in a State is treated as a private citizen and its land is subject to state and local taxing and regulatory jurisdiction. There is no basis in law or logic to endow OIN and other tribes with "super-sovereign" authority to bar the remedy of foreclosure that would be available against any other sovereign. *Okla. Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983).

3. Misapplication Of *In Personam* Jurisdiction Cases

In determining that tribal immunity from suit bars *in rem* foreclosure, the court of appeals (and district court) relied on two tribal sovereign immunity cases—*Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) ("*Kiowa*") and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) ("*Potawatomi*")—that addressed *in personam* actions. These cases are inapposite inasmuch as they address direct actions against a tribe. Neither decision speaks to the assessment or collection of lawfully-imposed real property taxes on tribally-owned parcels held in fee. Neither conferred super-sovereign authority on a tribe

to interfere with the taxing or regulatory authority of another sovereign with respect to lands located in *that* sovereign's territory. In contrast, both *Sherrill* and *Yakima* directly addressed the assessment and collection of ad valorem property taxes on lands held in fee, located within the taxing and regulatory jurisdiction of a state. Both decisions expressly authorize the local taxing authority to collect taxes through *in rem* foreclosure.

B. Disestablishment / Diminishment Of Former Reservation

This Court in *Sherrill* upheld the right of the City of Sherrill to assess and collect real property taxes without deciding if the Oneidas'[2] ancient reservation had been disestablished or diminished. The Oneidas' former reservation in New York has not physically existed in any meaningful way since the mid-1800s, with small fragments reduced to thirty-two acres by the late nineteenth century. This thirty-two acre remnant is sometimes referred to as the "Oneida territory." The land within the historic reservation's borders has been governed and taxed for generations by New York State and local governments. The record in *Sherrill* showed the claimed reservation area is distinctly non-Indian in character, having been developed by non-Indians in every way imaginable since the mid-nineteenth century. This Court in *Sherrill* referred to the Oneida reservation only in the past tense, using the adjectives "former," "ancient" and "historic." OIN continues to insist,

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

however, that a "not disestablished" physically non-existent 300,000-acre reservation in central New York still exists, a contention that cannot be reconciled with the historical realities detailed in *Sherrill*.

In the judicial proceedings below, OIN has argued that the existence of the "not disestablished" reservation:

- renders the area 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
- makes the area an Indian reservation, which triggers state-law tax exemptions for lands not recognized as an Indian reservation by New York for 150 years or more.

Each of these legal contentions, if sustained, would produce the highly disruptive effects that this Court sought to avoid in *Sherrill*.

STATEMENT OF THE CASE

A. This Court's Decision In *Sherrill*

In *Sherrill*, this Court rejected OIN's "unification theory" and claim of "present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations." 544 U.S. at 214. This Court held that "the Tribe cannot

unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id*. at 203. OIN had "refused to pay the assessed property taxes . . . [and] [t]he city of Sherrill initiated eviction proceedings in state court." *Id*. at 211.[3] OIN sued in federal district court and sought a broad injunction premised on OIN's sovereignty over the land and its sovereign immunity from suit. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 144 (2d Cir. 2003). Specifically, OIN requested an injunction that would forbid the City of Sherrill as taxing authority from: (1) imposing real property taxes on OIN-owned properties, (2) pursuing any remedies to collect taxes that were due, or (3) evicting OIN after taking title to the property for nonpayment of taxes. Joint Appendix ("JA") 164a.

OIN specifically asserted as an affirmative defense to the eviction action its tribal sovereign immunity from suit. JA125a. OIN also asserted tribal sovereign immunity from suit in its complaint seeking injunctive and declaratory relief preventing tax collection through foreclosure and eviction. JA162a . *See Oneida Indian Nation of New York v. City of Sherrill,* 145 F.Supp.2d 226, 238 (N.D.N.Y. 2001); *Sherrill*, 337 F.3d at 145-46, 169.

This Court in *Sherrill* rejected every aspect of OIN's claimed sovereign immunity from taxation and tax

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3. Prior to commencing the eviction action, the City of Sherrill had obtained title to the parcels through the City's administrative foreclosure procedures, as detailed in the district court's opinion in that case. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001).

enforcement, and fully endorsed the City of Sherrill's authority to foreclose and evict for nonpayment of taxes. 544 U.S. at 214. The decision specifically addressed whether tribal immunity could be raised either offensively or defensively by OIN to prevent the loss of its lands through foreclosure and eviction. Justice Stevens, in dissent, decried the Court's decision, believing it "effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id.* at 225; *see also id.* at 226. Justice Stevens specifically suggested that the tribe could raise sovereign immunity "as a *defense* against a state collection proceeding." *Id.* at 225 (emphasis in original); *see also id.* at 225-26. This Court expressly rejected that suggestion:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

Id. at 214, n.7 (internal citation omitted).

This Court made clear in *Sherrill* that "to reestablish sovereign authority over territory last held by the Oneidas 200 years ago," OIN would have to apply to have its lands taken into trust. *Id.* at 220-21. The lands would be exempt from state and local taxation only after they were in trust status.

B. Developments Post-*Sherrill*

Within days of this Court's ruling in *Sherrill*, OIN asked the Secretary of the Interior to take into trust all 17,370 checkerboarded acres of fee lands it owned in the Counties. JA254a.[4] At the same time, and continuing to the present, OIN has persisted in its refusal to pay delinquent property taxes on hundreds of recently-purchased properties that, like those in *Sherrill*, had been owned and governed by non-Indians for approximately 200 years and subject to state and local taxation for generations. In the face of OIN's continued refusal to pay the accrued taxes, the Counties resumed their foreclosure proceedings by employing their respective *in rem* procedures under New York law.[5]

OIN sought to enjoin both Counties from proceeding with foreclosure. The district court on October 27, 2005

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4. The Secretary ultimately decided to take approximately 13,000 acres into trust in a Record of Decision dated May 20, 2008 ("ROD"). JA246-312a. That decision is the subject of litigation pending in the Northern District of New York. *See, e.g., New York v. Salazar*, No. 08-cv-644 (N.D.N.Y., filed June 19, 2008). None of the parcels has been taken into trust.

5. Madison County's procedure requires a foreclosure action in state court after the redemption period has expired, while Oneida County employs a non-judicial administrative foreclosure proceeding by which the County takes title pursuant to a tax sale. Pet. App. at 8a-10a. In this regard, Oneida County's procedure is similar to the City of Sherrill's procedure as described by the district court (145 F. Supp. 2d at 232-33) and upheld by this Court in *Sherrill*. The last step in the City of Sherrill's procedure was eviction, which this Court noted. *See Sherrill*, 544 U.S. at 211.

granted summary judgment to OIN on four separate grounds, permanently enjoining Madison County from foreclosing (Pet. App. at 76a), stating, "unless directed otherwise by legislation or judicial mandate, the seizure of land from a sovereign, against its will, will not occur as a result of a ruling from this forum." *Id.* at 77a. The district court on June 2, 2006 granted OIN's motion for summary judgment on the same grounds, permanently enjoining Oneida County from foreclosing. *Id.* at 48a-50a.

C. Court of Appeals' Reading Of *Sherrill* And Other Cases Regarding Tribal Sovereignty

On April 27, 2010, the court of appeals affirmed the district court's orders on the single ground that "the foreclosure actions are barred by the OIN's sovereign immunity from suit." Pet. App. at 23a. The court of appeals declined to "read *Sherrill* as implicitly abrogating the OIN's immunity from suit." *Id.* at 20a. Rather, it found that "*Sherrill* dealt with 'the right to demand compliance with state laws.' It did not address 'the means available to enforce' those laws." *Id.* at 20a (quoting *Kiowa*, 523 U.S. at 755). The court of appeals believed *Sherrill* belonged to a line of "land-based" sovereignty decisions issued by this Court which address whether tribal sovereignty exists over land—but that *Sherrill* did not decide whether a tribe, which lacks sovereignty over taxable land, may nonetheless assert tribal immunity from suit as a defense to foreclosure for non-payment of taxes. *Id.* at 16a-17a. In reaching this conclusion, the court of appeals did not address the distinction between *in rem* and *in personam* jurisdiction drawn in *Yakima* despite being briefed by the parties.

Likewise, the court of appeals did not address the language in footnote 7 in *Sherrill* explicitly rejecting OIN's immunity from foreclosure and eviction. Instead, it relied on *Potawatomi* and *Kiowa*. Pet. App. at 32a. The concurring opinion noted the "rule of decision defies common sense," and deemed the result "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*" and "[reunite] law and logic."

D. Court of Appeals' Analysis Of The "Not Disestablished" Reservation

This Court's decision in *Sherrill* all but eliminated the factual and legal foundation for an existing "ancient Oneida reservation." Despite stating that it "need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation," 544 U.S. at 215, n.9, this Court in *Sherrill* repeatedly referred to the Oneida reservation in the past tense, using the adjectives "ancient," "historic" and "former," *id.* at 202-03, 213, 215, 221, while observing "the longstanding, distinctly non-Indian character of the area and its inhabitants[,]" *id.* at 202.

The district court below relied on the Second Circuit's 2003 decision in *Sherrill* (reversed by this Court) in concluding that the Oneida reservation was "not disestablished" (Pet. App. at 73a-74a)—although the district court refused to identify the reservation's present-day boundaries. *See Oneida Indian Nation of New York v. Madison County*, 235 F.R.D. 559, 561 (N.D.N.Y. 2006). The district court below also determined that OIN's "not disestablished" reservation

qualifies as an Indian reservation under New York law and therefore is not subject to taxation under state law. Pet. App. at 73a-74a.

The court of appeals below stated that "a tribe's immunity from suit is independent of its lands," and noted that it need not reach the Counties' argument that OIN's reservation had been disestablished because its conclusion did not depend on it. Pet. App. at 16a. The court of appeals nonetheless addressed the status of the ancient Oneida reservation in a footnote, observing that this Court in *Sherrill* "explicitly declined to resolve the question of whether the Oneida reservation had been 'disestablished'…." Pet. App. at 16a n.6. The court of appeals then concluded, "[o]ur 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." Pet. App. at 17a, n.6.

SUMMARY OF THE ARGUMENT

1. Tribal sovereign immunity does not bar *in rem* foreclosure for nonpayment of real property taxes, as this Court held in *Sherrill*. *Sherrill* upheld the City of Sherrill's right to assess and collect ad valorem property taxes on fee lands recently purchased by OIN. This Court in *Yakima* similarly affirmed the right of local taxing authorities to foreclose on tribally-owned properties for non-payment of lawfully assessed ad valorem property taxes. The *Yakima* Court found the property tax created a burden on the property alone, and that an *in rem* foreclosure proceeding was not significantly disruptive to tribal self-government. This

Court's tribal sovereign immunity precedents concerning *in personam* actions have no application to an *in rem* proceeding to collect taxes lawfully owed by a tribe.

Other sovereigns (foreign nations and the fifty States) do not enjoy immunity from *in rem* tax foreclosure proceedings if they, like OIN, purchase land within the taxing and regulatory jurisdiction of another sovereign.

The common law recognition of tribal immunity rests on a weak foundation and should be reexamined. Even if it has some vitality today, tribal immunity from suit is much weaker than the immunity from suit granted to the fifty States under the Constitution. There is no basis in law or logic to give quasi-sovereign tribes greater protection from *in rem* foreclosure proceedings than States and foreign countries.

2. This Court should declare the Oneidas' "ancient," "historic" and "former" reservation to be disestablished or diminished. The 1794 Treaty of Canandaigua merely acknowledged the Oneidas' reservation lands created and defined in the Oneidas' 1788 Treaty with New York. Contemporaneous interpretations of state-created reservations in New York confirmed that New York, possessing the right of preemption, had the authority to enter into treaties with New York Indians and create under New York law limited reservations through retrocession.

Over the next fifty years (1788-1838), the Oneidas sold all but 5,000 acres to New York in a series of treaties.

The United States knew of and approved or acquiesced in these treaties.

Even if the federal government had authority or jurisdiction over the Oneidas' reservation in New York, the 1838 Treaty of Buffalo Creek clearly expresses the Oneidas' and the federal government's agreement and intention to remove the Oneidas from New York to new homes in the west and to disestablish or at least diminish the 5,000-acre reservation then remaining, in keeping with federal policy to remove all Indians from eastern states.

Following ratification of the 1838 Treaty, most of the Oneidas sold their remaining lands in New York and promptly emigrated from New York. There has been no Oneida reservation in New York (except possibly the thirty-two acre territory) for well over a century. To say there is a still a 450 square mile "not disestablished" Oneida reservation in central New York is contrary to historical fact, law and logic.

ARGUMENT

I. Tribal Sovereign Immunity Does Not Bar *In Rem* Foreclosure For Nonpayment Of Real Property Taxes.

A. *Sherrill* Directly Upheld The City Of Sherrill's Right To Assess And Collect Ad Valorem Property Taxes.

Sherrill squarely held that OIN is barred from exercising sovereignty—in whole or in part—over

parcels purchased on the open market in fee simple, as to which the "embers of sovereignty . . . [had] long ago [grown] cold." 544 U.S. at 214. OIN's tribal patchwork of land owned in fee simple is subject to the full jurisdiction and taxing authority of local governments. (*See* Map attached as Addendum B to Brief). Following *Sherrill*, no valid distinction can be drawn between the Counties' right to tax the land and its right to enforce those taxes through foreclosure and eviction. *Id*. at 214, n.7.

The record in *Sherrill* shows OIN asserted its tribal sovereign status as a complete bar to the City of Sherrill's right to assess *and collect* ad valorem property taxes. OIN specifically asserted tribal sovereign immunity from suit as a bar to the City's foreclosure and eviction proceedings. JA125a, 162a. In rejecting each aspect of OIN's asserted tribal sovereignty, and expressly rejecting Justice Stevens' suggestion that tribal immunity should bar the tax enforcement and eviction proceedings, *Sherrill*, 544 U.S. at 214 & n.7, this Court necessarily reached and rejected OIN's claim that its sovereign immunity from suit barred the *in rem* tax collection and *in personam* eviction proceedings.

The plain meaning of *Sherrill* was apparent to the Department of Interior in the months following the issuance of the decision. Associate Deputy Secretary of the Interior, James E. Cason, in a letter to OIN representative Ray Halbritter, dated June 10, 2005, stated:

> [I]t is our opinion that the Court in *City of Sherrill* unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real

> property taxes. In the event the taxes are not paid, we believe such lands are subject to foreclosure.

JA74a.[6]

A contrary reading would divorce law from logic and in the process promote civil disobedience and disrespect for the law. It would eviscerate the Court's holding in *Sherrill* and encourage tribes to engage in disruptive tax protests, knowing that the taxing authorities were powerless to enforce lawfully-imposed real property taxes. Tribes, emboldened by the absence of any tax enforcement mechanisms, would be encouraged to flex and flaunt their tribal immunity from suit in other contexts as well, resisting lawfully-imposed zoning, land use and other regulatory requirements. *See Sherrill*, 544 U.S. 220 n.13; *State of New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 187-88, 302 (E.D.N.Y. 2007) (enjoining planned construction of 61,000 square foot gaming facility not in compliance with New York anti-gaming laws and environmental laws and local building, land use, sanitation and other regulatory requirements).

The court of appeals' incorrect reading of Sherrill would also permit OIN to re-litigate its sovereign immunity defense now, even though the defense was before this Court in 2005. This Court did not carve out any aspect of OIN's claimed sovereign immunity defense

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6. Cason's letter rejected OIN's request, post-*Sherrill*, to have the Department accept deeds to 331 taxable fee parcels and record them as restricted fee land, not subject to alienation, pursuant to 25 U.S.C. § 177 (Indian Trade and Intercourse Act).

from the *Sherrill* decision, and the opinion does not qualify, condition or restrict in any manner the right of local governments to assess and collect real property taxes.

Accordingly, the rule of decision in *Sherrill* that local governments have the authority to assess and collect real property taxes on OIN's recently purchased fee properties controls here and requires reversal of the judgment below.

B. This Court In *Yakima* Affirmed The Right Of Local Taxing Authorities To Foreclose On Tribally-Owned Properties For Non-Payment Of Lawfully Assessed Ad Valorem Property Taxes.

In *Yakima*, this Court upheld a local government's right to foreclose on tribally-owned properties for unpaid real property taxes. Specifically, this Court held that Yakima County in Washington State had the power to collect ad valorem property taxes through *in rem* foreclosure proceedings where those taxes were lawfully imposed on tribally-owned lands held in fee simple. 502 U.S. at 270. The lands in question in *Yakima* were fee-patented (alienable) lands within the tribe's reservation. Yakima County assessed ad valorem property taxes on the fee-patented lands, some of which were owned by the Yakima Nation, and others were owned in whole or in part by individual members of the Tribe. *Id.* at 256.[7] When the Yakima Nation and individual members

7. A document styled "Stipulation of Facts for Summary Judgment" filed in the district court in *Yakima* detailed the Yakima Nations' interest on the fee land. *See* Excerpts of the *Yakima* Joint Appendix (attached as Addendum A, at 12a-13a).

refused to pay the assessed property taxes, Yakima County commenced *in rem* tax foreclosure proceedings. *Id.*

The Yakima Nation, on its own behalf and on behalf of its members owning fee patented parcels of land within the reservation, brought suit seeking an injunction to prohibit the assessment and collection of ad valorem property taxes on any of the fee lands within the reservation, whether owned by the Nation or its members. *Id.* Specifically, the Yakima Nation's complaint stated "[t]he defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and/or its members have a fee patent interest." Addendum A, at 5a. The Nation asserted it was "entitled to a judgment declaring that fee patent land . . .owned by the Yakima Nation and/or its enrolled members . . .are not subject to State or County ad valorem taxes. *Id.* The Yakima Nation specifically sought "an injunction against the defendants prohibiting . . . the levy, imposition or collection of ad valorem taxes upon the fee patent land of the Yakima Nation and its tribal members . . . ." *Id.* at 9a.

This Court recognized Yakima County's right to tax *and* foreclose on the Indian-owned lands inside the Yakima reservation—including both tribally-owned and individually-owned parcels—observing that the alienability of the lands "rendered them subject to assessment and forced sale for taxes." *Yakima*, 502 U.S. at 263-64. This Court rejected the arguments advanced by the Yakima Nation and United States that the resulting parcel-by-parcel taxation of fee-patented lands

within the Yakima Reservation would create an "impracticable, *Moe*-condemned 'checkerboard' effect. . . ." *Id.* at 264-65. In doing so, this Court drew a distinction (which the court of appeals below failed to recognize) between *in rem* and *in personam* jurisdiction:

> [B]ecause the jurisdiction is in rem rather than in personam, it is assuredly not *Moe*-condemned; and it is not impracticable either.
>
> * * *
>
> While the in personam jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, *the mere power to assess and collect a tax on certain real estate is not.*

Id. at 265 (emphasis added).

This Court further explained in *Yakima* that the assessment of ad valorem property taxes "creates a burden on the property alone," such that the "[l]iability for the ad valorem taxes flows exclusively from ownership of realty on the annual date of assessment." *Id.* at 266. Thus, this Court in *Yakima* recognized the distinction between an *in rem* proceeding involving real estate held by a tribe, on the one hand, and an *in personam* proceeding against a tribe, on the other hand.[8]

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8. In altogether overlooking the distinction between *in rem* and *in personam* jurisdiction, the court of appeals failed to (Cont'd)

Under *Sherrill* and *Yakima* state and local taxing authorities have the right to impose *and collect* real property taxes assessed on Indian-owned land held in fee simple within the sovereign jurisdiction of the State—even if the land is located within the boundaries of an existing reservation, as was the case in *Yakima*. Tribal sovereign immunity from suit erects no bar to foreclosure in either case because an *in rem* proceeding to take title to property for unpaid taxes is directed to the "res," not the tribe, and is not disruptive of tribal self-government.[9]

(Cont'd)
evaluate the specifics of New York foreclosure law or the particular foreclosure procedures employed by the Counties. New York law recognizes that a foreclosure action is not a proceeding against the taxpayer; it is an *in rem* proceeding directed to the tax-delinquent parcel. *In re Burg*, 295 B.R. 698, 703 (Bankr. W.D.N.Y. 2003) (it "is a proceeding against property and not against an individual.") (applying New York law). *See* 13 Warren's Weed, New York Real Property, Tax Foreclosures, Ch. 134, § 134.01-134.04 (5th ed. 2010). In keeping with that legal framework, the Counties employed *in rem* foreclosure procedures to the fee lands in question. Madison County used a judicial foreclosure process. Oneida County employed an administrative foreclosure procedure similar to the one followed by the City of Sherrill. *See supra* note 5.

9. This Court's analysis in *Yakima* applies even more forcefully if the Oneidas' former reservation is declared disestablished or severely diminished (*see infra* Part II). Especially, in that case, collecting taxes on the fee lands does not disrupt tribal self-governance.

C. This Court's Sovereign Immunity Precedents Concerning *In Personam* Actions Against Tribes Have No Application Here.

1. *Potawatomi* Is Inapposite.

Potawatomi "clarif[ied] the law of sovereign immunity with respect to the collection of *sales taxes on Indian lands*." 498 U.S. at 509 (emphasis added). The Court in *Potawatomi* did not purport to determine anything whatsoever about tribal immunity with respect to the collection of *real property taxes on fee lands within the taxing and regulatory jurisdiction of a state*. *Potawatomi* does not diminish the *Yakima* rule that an *in rem* foreclosure proceeding to collect lawfully-imposed property taxes on fee land does not violate tribal sovereignty because it is not "significantly disruptive of tribal self-government . . . ." *Yakima*, 502 U.S. at 265.[10] To the contrary, this Court in *Yakima* did not rely on *Potawatomi*—even though both the Yakima Nation and the United States cited *Potawatomi* in their briefs. *See* Brief of Respondent/Cross-Petitioner, 1991

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10. OIN operates the highly profitable Turning Stone Casino (www.turningstone.com), and certainly can pay property taxes without impairing its ability to govern itself. *See* Glenn Coin, *Oneida Nation Profits $115M Report Commissioned by State Shows Nation's Businesses Worth $2 Billion*, The Post-Standard (Syracuse, NY), Mar. 17, 2007, at A1 (2007 WLNR 5097843), OIN reported on November 19, 2010 that it was awarding $4.3 million in bonuses to about 90% of its 4,500 employees, stating that "although the U.S. economy remains stagnant . . . the Nation's enterprises . . . performed exceedingly well and again exceeded last year's economic performance." *See* http://www.oneidaindiannation.com/pressroom (last visited November 20, 2010).11

WL 521292, *35, *39 (1991); Brief for the United States as Amicus Curiae Supporting Respondent/Cross-Petitioner, 1991 WL 11009207,*7 (1991). This Court apparently deemed it unnecessary to distinguish the immunity rule in *Potawatomi* in that it did not control the case of *in rem* foreclosure proceedings to collect real property taxes on fee land.

The Court in *Potawatomi* emphasized that the tribal store in question was located on federal trust lands and acknowledged the tribe exercised sovereignty over that land. 498 U.S. at 508, 511. Given the tribe's sovereignty over the land (which is altogether missing as to the parcels at issue in *Sherrill* and here) this Court rejected the Oklahoma taxing authority's bid to sue the tribe to enforce the tribe's sales tax collection obligations for sales of cigarettes to nonmembers of the tribe, even though Oklahoma had a lawful right to tax those sales. *Id.* at 507, 512-13.

The Court specifically noted that the State of Oklahoma was not left without a remedy inasmuch as it could collect the sales tax from the wholesale distributor, and because the State could sue individual members of the tribe who violated Oklahoma law with respect to collecting sales taxes on cigarettes sold at the store. *Id.* at 514.

This Court also noted that the State of Oklahoma could seize unstamped cigarettes off the reservation. *Id.* at 514. By authorizing an *in rem* off-reservation seizure of the cigarettes—on lands within the taxing and regulatory jurisdiction of Oklahoma—*Potawatomi* actually supports rather than undermines the right of

the Counties to collect by foreclosure real property taxes assessed on lands located within the taxing and regulatory jurisdiction of New York State. The Second Circuit's reading of *Sherrill*, in contrast, leaves the Counties without an adequate remedy for nonpayment of real property taxes.[11]

2. *Kiowa* Is Inapposite.

Although the Second Circuit purported to follow *Kiowa*, that case is wholly inapposite. *Kiowa* did not involve state taxation or any regulatory action. Rather, *Kiowa* involved an *in personam* breach of contract action against the tribe, brought by a private party that voluntarily entered into a transaction with the tribe. *Kiowa*, 523 U.S. at 754. This Court concluded that the *in personam* action was barred by the doctrine of tribal

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11. The court of appeals suggests, without explaining, that "[i]ndividual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief" in connection with OIN's nonpayment of property taxes. Pet. App. 23a. This suggestion would only lead to more litigation without any assurance that this "remedy" is viable. Susceptibility to suit may, but does not necessarily, equate to individual liability for unpaid tribal property taxes. Whether the Northern District of New York was right or not, it concluded in 2001 that it was "clear that the [OIN] representatives cannot be held personally liable for the unpaid property taxes" owed to the City of Sherrill. *Sherrill*, 145 F. Supp. 2d at 263; *aff'd on other grounds*, 337 F.3d at 169 (affirming dismissal of claims against tribal members and officers on ground that lands were not taxable), *rev'd*, 544 U.S. at 203, 212; *see also Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (observing "no other means of recovery for unpaid property taxes exists" besides foreclosure).

sovereign immunity. *Id*. at 760. At the same time, this Court frankly noted that "there are reasons to doubt the wisdom of perpetuating the doctrine," *id*. at 758, but felt compelled to adhere to it because Congress had not dispensed with it. *Id*. at 759-60. The Court, however, did not suggest that it was overruling or restricting *Yakima* in any way, and certainly did not suggest that a state sovereign is powerless to collect lawfully-imposed real property taxes.

D. Principles Of Tribal Sovereign Immunity From Suit, Developed In The Context Of *In Personam* Actions Brought Directly Against Tribes, Should Not Be Extended To *In Rem* Foreclosure Proceedings To Collect Delinquent Taxes.

1. The Limited Nature of *In Rem* Actions

As this Court recognized in *Yakima*, because an *in rem* foreclosure proceeding is directed to the land, rather than to the landowner, it is not significantly disruptive of tribal self-government. *See* 502 U.S. at 256, 265. This is true whether the tax foreclosure proceeding is brought under Washington law as in *Yakima* or under New York law as here. *See In re Burg*, 295 B.R. at 703 and note 8, *supra*.

2. The Limits On Sovereign Immunity When One Sovereign Owns Land In Another Sovereign's Territory

This Court's sovereign immunity jurisprudence regarding the fifty States and foreign countries denies

immunity to sovereigns who acquire real property within the jurisdiction of another sovereign. In the foreign immunity context, the "immovable property" exception means foreign countries do not have immunity with respect to land purchased in the United States, except land used for official diplomatic and consular purposes. *See City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd*, 551 U.S. 193 (2007) ("when owning property here, a foreign state must follow the same rules as everyone else"); 28 U.S.C. 1605(a)(4) (providing that "[a] foreign state shall not be immune from the jurisdiction of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue"); Restatement (Second) of Foreign Relations Law § 68(b) (1965) ("[t]he immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction"); *see also* Restatement (Third) Foreign Relations Law §§ 455(10)(c), 460(2)(e) (1987) (re-adopting "immovable property" exception). Any land that is not used for diplomatic or consular purposes is treated as private property held by a private owner. It is subject to the full panoply of state and local taxation and regulation. This includes *in rem* actions against "real property located in the territory of the state exercising jurisdiction." Restatement (Second) of Foreign Relations Law § 68(b), cmt. d (noting foreign nation is not entitled to raise sovereign immunity as a defense to state *in rem* condemnation action). Thus, if a foreign nation failed to pay lawfully-imposed real property taxes, it could not raise sovereign immunity as a defense to an *in rem* foreclosure proceeding.

An equivalent "immovable property" rule applies to state sovereigns: "[L]and acquired by one state in another state is held subject to the laws of the latter and to all the incidents of ownership." *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924). The acquiring state cannot extend its sovereignty over the land. *Id.* at 481; *see State v. City of Hudson*, 42 N.W.2d 546, 548 (Minn. 1950) ("[A] state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state . . . ceases at the state line[.]"). Thus, if a State acquires land within the taxing jurisdiction of another State, the acquired land is subject to taxation. The out-of-state-sovereign is treated like a private citizen; its property may be subjected to a forced tax sale to satisfy unpaid taxes. *See City Council of Augusta Ga. v. Timmerman*, 233 F. 216, 217, 219 (4th Cir. 1916) (land located in South Carolina, owned by Georgia, subject to forced tax sale).

3. The Limited Scope Of Tribal Sovereignty

Native American tribes have been described as "domestic dependent nations," *Cherokee Nation*, 30 U.S. at 17, and "wards of the nation," *United States v. Kagama*, 118 U.S. 375, 382 (1886), giving tribes a "peculiar 'quasi-sovereign' status." *Three Affiliated Tribes*, 476 U.S. at 890-91. Tribes retain "a semi-independent position . . . not as States, not as nations, not as possessed of full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (citations

omitted);[12] *see also Wheeler*, 435 U.S. at 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character."). Indeed, tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.*

The "unique and limited character" of tribal sovereignty stands in contrast to the plenary sovereignty of the federal government and each of the fifty States under the Constitution. *See Alden v. Maine*, 527 U.S. 706, 712-15 (1999) ("our Constitution . . . reserves to [the States] a substantial portion of the Nation's primary sovereignty . . . . The States thus retain 'a residuary and inviolable sovereignty.'").

4. The Unsound Foundation Of Tribal Sovereign Immunity From Suit

Tribal immunity from suit is not constitutionally protected, but rather developed as part of this Court's common law. *See Kiowa*, 523 U.S. at 756.[13] In *Kiowa* this Court recognized that the doctrine of tribal sovereign immunity "developed almost by accident" and is said to "rest on the Court's opinion in *Turner v. United States*, 248 U.S. 354 (1919) . . . [which] simply does not stand for that proposition." *Kiowa*, 523 U.S. at 756. Justice

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12. Tribes are "unique aggregations possessing attributes of sovereignty over both their members and territory." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (quoting *U.S. v. Mazurie*, 419 U.S. 544, 577 (1975)).

13. In contrast, the immunity afforded to the federal government and the several States is rooted in the Constitution. *See Alden*, 527 U.S. at 712-14.

Stevens' dissenting opinion in *Kiowa* (joined by Justices Thomas and Ginsburg) observed that the doctrine of tribal immunity from suit had been questioned by Justice Blackmun, "one of the strongest supporters of Indian rights on the Court," in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977). *Kiowa*, 523 U.S. at 762. In *Puyallup*, Justice Blackmun doubted "the continuing vitality in this day of the doctrine of tribal immunity" and believed "the doctrine may well merit re-examination in an appropriate case." 433 U.S. at 178-79 (Blackmun, J., concurring). In a concurring opinion in *United States v. Lara*, 541 U.S. 193, 218 (2004), Justice Thomas also questioned the continued recognition of tribal sovereignty because "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."

To the extent the common law doctrines of tribal sovereignty and tribal immunity from suit have any vitality today, tribes enjoy only "a limited immunity from suit" commensurate with the "unique and limited character" of tribal sovereignty. *Three Affiliated Tribes*, 476 U.S. at 890-91 ("Of course, because of the peculiar 'quasi-sovereign' status of Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.")

Indian semi-sovereignty and limited tribal immunity from suit should not be extended to bar tax collection or regulatory enforcement concerning fee lands that are exclusively within the sovereign jurisdiction of one of the fifty States. To allow OIN to assert tribal immunity as a defense to the Counties' tax collection

proceedings—where the taxes were lawfully imposed on fee land within New York State's territorial jurisdiction as expressly held in *Sherrill*—is to undermine State sovereign authority over its territory while rewarding OIN for defying this Court's decision.

E. Extending Tribal Sovereign Immunity From Suit To Bar *In Rem* Foreclosure Would Unjustifiably Endow Tribes With Super-sovereignty.

Denying the Counties the right to collect lawfully-imposed real property taxes creates without justification a kind of super-sovereignty for tribes that gives them the right to resist lawful taxes and regulatory requirements that no foreign nation or state sovereign enjoys. That result cannot be reconciled with the "limited character" of tribal sovereignty and a tribe's correspondingly limited immunity from suit. In short, Indian tribes do not have "super-sovereign authority to interfere with another jurisdiction's sovereign right[s] . . .within that jurisdiction's limits." *Chickasaw Nation*, 515 U.S. at 466.

Accordingly, this Court should reverse the judgment of the court of appeals that held sovereign immunity bars the Counties from foreclosing on OIN's fee-owned parcels. In doing so, this Court should make clear that if OIN chooses not to redeem the delinquent parcels by paying the lawfully-imposed taxes and statutory interest and penalties, and instead continues to defy the rule of law established by this Court, the Counties may foreclose and, if necessary, bring eviction proceedings against the tribe and its members to gain lawful possession, as this Court previously authorized the City of Sherrill to do.

OIN should acknowledge that the fee lands are within the taxing and regulatory jurisdiction of the Counties under *Sherrill* and pay the property taxes that are lawfully owed.

II. This Court Should Declare the Oneidas' "Ancient," "Historic" And "Former" Reservation To Be Disestablished Or Diminished.

The district court below found that "[t]he Nation's reservation was not disestablished," citing the Second Circuit's 2003 decision in *Sherrill*, 337 F.3d at 167. Pet. App. at 73a. The district court then held that because "the properties at issue are located within the Nation's reservation," they are exempt from taxation under New York State law. *Id.* at 73a-74a, 44a-45a. The Second Circuit reaffirmed its prior holding on the disestablishment question. *See* Pet. App., at 16a-17a, n.6. As a result, if this Court should reverse the judgment below and hold that tribal sovereign immunity from suit does not bar foreclosure, the reservation issue will need to be resolved. The Court should resolve that issue now. To perpetuate a questionable pre-*Sherrill* finding that there is a "not disestablished" Oneida reservation of some 250,000 to 300,000 acres (or 400 to 450 square miles) only creates uncertainty, jurisdictional and tax disputes, and community disruption in Madison and Oneida Counties.

The historical record shows the Oneida reservation was established by the 1788 Treaty of Fort Schuyler ("1788 Treaty") between the Oneidas and New York State. JA197a-202a. The 1794 Treaty of Canandaigua ("1794 Treaty") between the United States and the Six

Nations (including the Oneidas) (7 Stat. 44) (JA202a-208a) "acknowledged" the Oneida reservation established under the 1788 Treaty. But the 1794 Treaty did not confer any legal rights on the Oneidas or abrogate the rights of New York State under the 1788 Treaty. Moreover, the Oneida reservation established by New York was disestablished or diminished as the result of land sale treaties with New York over a fifty-year period from the late 1700s to the mid-1800s (condoned by and in many cases facilitated by the federal government); by the Treaty of Buffalo Creek in 1838 (7 Stat. 550) ("1838 Treaty") (JA208a-245a); and by the fact of the Oneidas' near-complete removal from New York by the mid-nineteenth century.

As this Court stated in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998),"[e]ven in the absence of a clear expression of congressional purpose [to diminish a reservation], unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Id.* at 351 (citing *Solem v. Bartlett*, 465 U.S. 463, 471 (1984)). Further, "where non-Indian settlers flooded into . . . 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." *Id.* at 356 (citing *Solem*, 465 U.S. at 471).

This brief applies these principles to the historical record beginning with this Court's findings in *Sherrill* regarding the former Oneida reservation.

A. This Court's Observations About The Oneidas' Former Reservation In New York

This Court in *Sherrill* did not decide whether the Oneidas' "historic," "ancient" and "former" reservation

in central New York had been disestablished by the 1838 Treaty of Buffalo Creek and subsequent developments, including the almost complete removal of Oneidas from New York and alienation of their remaining landholdings in New York, save thirty-two acres. 544 U.S. at 215, n.9. Yet the historical realities all pointed toward a disestablished (or at least severely diminished) reservation from which the Oneidas had removed by the mid-nineteenth century. This Court not only consistently described the claimed reservation in the past tense, *id.* at 202-03, 213, 215, 221, it observed "the longstanding, distinctly non-Indian character of the area and its inhabitants[,]" *id.* at 202. Twenty years earlier, Justice Stevens, in a dissenting opinion in *Oneida II* reviewed the pertinent history and observed that "[t]here is … 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 . . . ." *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 269 n.24 (1985).

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

The court of appeals took a very different view of the Oneidas' history in New York—without the benefit of this Court's decision in *Sherrill*—and concluded that the 1838 Treaty neither diminished nor disestablished the Oneida Reservation in New York. 337 F.3d at 165. The court of appeals' decision gives almost no weight to the federal removal policy that motivated and informed the 1838 Treaty, *id.* at 163, and is equally or more dismissive about the subsequent history that confirms the Oneidas' nearly complete removal from New York

State, *id*. at 163-64.[14] Instead, the court of appeals focused on a perceived lack of clarity about the federal government's intent as expressed in the Treaty itself, and on a declaration from a U.S. treaty commissioner, executed after the treaty was signed, stating that the Commissioner had advised some Oneidas that if they did not want to sell their lands and emigrate, they did not have to—they would not be forced to leave. *Id*. at 161-62.

A fair reading of the historical record before and after 1838 resonates with this Court's findings in *Sherrill* and supports the conclusion that the federal government intended in the Treaty of Buffalo Creek to diminish or disestablish the Oneidas' reservation in New York. After reviewing the pertinent history below in subsections C and D, subsection E discusses the errors of both fact and law in the court of appeals' pre-*Sherrill* analysis that led it to a contrary conclusion.

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14. The court of appeals incorrectly stated that "the sales to New York State were never accomplished, and the planned removal never took place." 337 F.3d at 161-162. While certain federal funding was not made available to help with the removal, the record unambiguously shows the Oneidas entered into a series of land purchases with New York State between 1838 and 1846, expressly authorized by the 1838 Treaty, and the majority of Oneidas emigrated from New York in that period. *See Sherrill*, 544 U.S. at 207; *infra* Part II.D.2. As a result, the Oneidas' landholdings and number of tribal members in New York sharply declined after 1838, as contemplated by the parties to the 1838 Treaty. *See Sherrill*, 544 U.S. at 207; *infra* Parts II.D.1-3.

C. The Historical Record Before 1838

1. New York State Created The Oneida Reservation Under New York Law In 1788.

New York State entered into the Treaty of Fort Schuyler with the Oneidas in 1788—before the U.S. Constitution became effective—which established a state reservation. JA197a-202a. This reservation was a creature of New York law, defined by New York law, and was a valid exercise of New York State sovereignty under the Articles of Confederation. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1160-61 (2d Cir. 1988). New York's authority to deal with the Oneidas was rooted in the fact that New York held the right of preemption to their lands. As this Court noted in *Oneida I*, "the United States never held fee title to the Indian lands in the original states as it did to almost all the rest of the continental United States and that fee title to Indian lands in these states, or the pre-emptive right to purchase from the Indians, was in the state." *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 670 (1974).

The 1788 Treaty's "First" Article states in its entirety:

> First, The Oneidas do cede and hereby grant all of their lands to the State of New York forever.

JA 197a. The "Second" Article, then describes specific lands that "shall be reserved" from "the said ceded lands." JA197a-199a. The effect of the plain treaty

language was to convey all the Oneidas' lands to New York, and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption, acquired absolute fee title to the ceded lands. Only after that complete cession, and only out of the "said ceded lands," did New York "reserve" the Oneida reservation, over which the State retained substantial jurisdiction, as described in the treaty.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent), described the treaty as follows:

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this State, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding 21-years.

Goodell v. Jackson, 20 Johns 693, 729 (N.Y. Sup. Ct. 1823). This Court in 1831 specifically acknowledged the right of New York, in the confederal period, to create Indian reservations by retrocession. *See Cherokee Nation*, 30 U.S. at 17 ("Treaties were made with some tribes by the state of New York, under a then unsettled construction of the Confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence."). This Court's observations in *Cherokee Nation* necessarily referred to the Oneidas and the 1788 Treaty, among others.

Because the 1788 Treaty was a New York State treaty, that treaty is properly construed under New York law as stated by the Supreme Court of Judicature of New York in *Goodell*. And as construed under New York law, the Oneidas did not retain aboriginal title to the state-created reservation lands, which is the premise underlying the alleged existence of a federally-protected treaty right under the 1794 Treaty of Canandaigua.

2. The 1794 Treaty Of Canandaigua Did Not Create A Federal Reservation.

The 1794 Treaty was intended to: (1) reconfirm peace between the United States and the Senecas, in particular over that part of Pennsylvania known as the Erie Triangle, located immediately west of New York State; (2) correct an inadvertent geographical error along the western boundary of New York; and (3) relinquish any rights the United States may have acquired through that error. *See Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 487 (W.D.N.Y. 2002). OIN itself has argued that the Treaty of Canandaigua did not apply within the State of New York. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982).

In keeping with its focus on the western boundaries of New York, the 1794 Treaty includes sparse verbiage regarding the Oneidas' reservation 200 miles to the east. U.S. Commissioner Timothy Pickering understood that the United States had neither title to, nor jurisdiction over, those lands since "the whole lay within the jurisdiction of New York." *Seneca Nation of Indians*,

206 F. Supp. 2d at 491. New York State also held the right of preemption to those lands. *See Oneida I*, 414 U.S. at 667. Because New York exercised jurisdiction over the Oneidas' lands in New York, and held the right of preemption to those lands, the 1794 Treaty could not have created a federal Indian reservation there, or convert the state reservation into a federal reservation, without impairing the rights of New York under the 1788 Treaty.

The absence of any intent to establish a federal reservation in the 1794 Treaty is further shown by contrasting the language of the November 11, 1794 Treaty with the August 3, 1795 Treaty of Greeneville (7 Stat. 49) with the Wyandots and other tribes, which was also executed under Pickering's supervision and with his approval. That treaty—unlike the 1794 Treaty—concerned lands in the Northwest Territory (in what later became the States of Ohio and Indiana) that were within the federal government's jurisdiction and as to which the federal government held the right of preemption. *See generally Strong v. United States*, 207 Ct. Fed. Cl. 254, 258-73 (1975). Accordingly, the 1795 Treaty of Greenville clearly and unambiguously restricted the tribes' right to sell to only the United States:

> [W]hen those tribes . . . shall be disposed to sell their lands . . . they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their land against all citizens of the United States . . ..

> And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

7 Stat. 49, 52.

3. The Oneidas Sold 295,000 Of The Original Reservation's 300,000 Acres In Land Sale Treaties With New York Before 1838.

As noted above, New York held the right of preemption to the underlying fee title in the Oneidas' lands. After the Constitution was adopted in 1789, New York State and the fledging central government sometimes disagreed on the division of responsibility and jurisdiction over the Oneidas and other New York Indians who lived on state-created reservations. *See generally The Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 375-385 (1978). New York continued to exercise powers that it believed it possessed through the right of preemption and powers constitutionally allocated to the States. *See id.* New York continued to enter into land sale transactions with the Oneidas and other New York Indians as part of a policy to remove Indians from New York. *See id.* at 385-395. 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." *Id.* at 389; *see id.* (noting Federal Indian Agent and New York State Judge together petitioned the Secretary of War in 1808 to make lands west of Mississippi available for removal of New York Indians).

Between 1795 and 1846, New York State entered into 25 treaties with the Oneidas. *Id*. at 373-374. Through these treaties New York State "acquired virtually the entire Oneida reservation." *The Oneida Indian Nation of New York v. United States*, 26 Ind. Cl. Comm. 138, 140 (1971). As determined by the Indian Claims Commission in proceedings initiated by the Oneida Indian Nation of New York, which lasted 27 years (1951-1978), the United States directly participated in two treaties (the June 1, 1798 Treaty and June 4, 1802 Treaty) *United States v. The Oneida Nation of New York*, 201 Ct. Fed. Cl. 546, 555 (1973), and had actual or constructive notice of all of the other 23 treaties. *Oneida Indian Nation,* 43 Ind. Cl. Comm. at 375. Indeed, as this Court noted in *Sherrill*, "[a]s recounted by the Indian Claims Commission in 1978, early 19th-century federal Indian agents in New York State did not simply fail to check New York's land purchases, they 'took an active role . . . in encouraging the removal of the Oneidas . . . to the west.' " 544 U.S. at 205-06 (quoting 43 Ind. Cl. Comm. at 390); *see* 43 Ind. Cl. Comm. at 391 ("[Federal] Indian agents . . . were deeply involved in the plans of both New York State and the Ogden Land Company to bring about the removal of the Six Nations to the west and the acquisition of their lands by New York State.").

The Indian Claims Commission summed up the historical record on New York State and Federal Government collaboration on Indian removal as follows:

> The record also indicates that the United States had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job,

> i.e., buying lands from the New York Indians in order to persuade them to move west. The Federal Government's removal policy applied not just to New York State, but to the entire Atlantic seaboard. In New York State the state was carrying out policy with very little Government help and that evidently was much to the liking of the Federal Government.

Id. at 405.

D. The 1838 Treaty of Buffalo Creek Between The United States and The New York Indians Expressed The Intention Of The United States To Disestablish or Diminish the Oneida Reservation in New York.

To the extent the federal government had any authority or jurisdiction over the state-created Indian reservations in New York State, the 1838 Treaty is clear on its face about the federal government's intent to disestablish or diminish the Oneida reservation in New York. This is true whether that reservation is understood to be a federal or state reservation. The 1838 Treaty's lengthy initial "whereas" clause (or 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." JA208a. 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. JA208a-210a. The preamble provides that under the 1838 Treaty the Six Nations will remove instead to the

Indian territory west of the Mississippi. *Id.* The final whereas clause acknowledges President Van Buren's embrace of the federal policy of removal:

> [T]he President is . . . 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 . . . that it is their . . . interest to do so without delay.

JA210a.

The obligation to remove to the Indian territories is defined in Article 2 of the 1838 Treaty, which provides that the United States has agreed to "set apart a 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 . . ." JA211a. Article 2 further provides 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 within the State of New York . . . ." JA212a. (emphasis added).

Two other provisions expand on the treaty rights and obligations of the Oneidas in New York. Article 5 provides that, "[t]he Oneidas are to have their lands in the Indian territory . . . ." JA213a. Article 13 lays out compensation terms for New York Oneidas and authorizes them to sell their remaining lands to New York in accordance with their agreement to remove:

> The United States will pay the sum of four thousand dollars to be paid to Benjamin 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.

JA218a.

Further evidence of the federal intent to substantially diminish if not disestablish the Oneida reservation is set out below. It consists of three categories of historical information: (1) contemporaneous records in the form of Presidential proclamations regarding the 1838 Treaty and federal policy to remove all Indians from New York and other eastern States—showing the 1838 Treaty as a natural step in the removal process that had already diminished the Oneida reservation by 98%; (2) records regarding the implementation of the 1838 Treaty including a series of state treaties in the 1840s by which the Oneidas sold most of their remaining land in New York and promptly removed to Wisconsin and Canada; and (3) records documenting 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*.

1. Contemporaneous Historical Record Of 1838 Treaty

The 1838 Treaty was an expression of the federal government's then-existing "remedial" policy to remove Indians from all eastern states. *See Oneida Indian Nation*, 43 Indian Cl. Comm. at 391-403 (describing the federal removal policy and "outlining in detail the negotiations leading up to the Treaty of Buffalo Creek."). The federal removal policy was set forth in various acts of Congress, including the Indian Removal Act of 1830 (4 Stat. 411). Article 2 of the 1838 Treaty expressly identifies the Indian Removal Act as authorizing the terms of the Treaty. JA212a. President Martin Van Buren's message to Congress on December 3, 1838 recounted the policy's history:

> The remedial policy, the principles of which were settled more than thirty years ago under the Administration of Mr. Jefferson, consists in an extinction, for their consideration, of the title to all the lands still occupied by the Indians within the States and Territories of the United States; their removal to a country west of the Mississippi much more extensive and better adapted to their condition than that on which they resided ... [t]his has not been the policy of particular Administrations only, but of each in succession since the first attempt to carry it out under that of Mr. Monroe.

3 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1833-1841, Second Annual Message (December 3, 1838), at 498 (1897).

In his message to Congress two years later, President Van Buren reinforced the message about the Indian removal policy and reported on its success during his administration:

> The policy of the United States in regard to the Indians, of which a succinct account is given in my message of 1838, and of the wisdom and expediency of which I am fully satisfied, has been continued in active operation throughout the whole period of my Administration. Since the Spring of 1837 more than 40,000 Indians have been removed to their new homes west of the Mississippi, and I am happy to add that all accounts concur in representing the result of this measure as eminently beneficial to that people.

Id., Fourth Annual Message (December 5, 1840), at 616.

President Van Buren proclaimed the Treaty of Buffalo Creek on April 4, 1840.

2. Land Sales to New York And Removal Of Oneidas Post-1838

The Oneidas possessed approximately 5,000 remaining acres in 1838 and sold 80% of that land to New York State within five years of signing the Treaty

of Buffalo Creek. *Sherrill*, 544 U.S. at 206-07 ("By 1843, the New York Oneidas retained less than 1,000 acres in the State").[15] *See Oneida Indian Nation*, 43 Ind. Cl. Comm. at 385 (detailing Oneida–New York State treaties between June 19, 1840 and February 23, 1846). The Indian Claims Commission specifically determined that these treaties were authorized by the Treaty of Buffalo Creek. *Id.* at 385, 406-07. The Oneidas who sold their lands removed to Wisconsin or Canada, as intended and agreed. *See* The Oneida Indian Journey from New York to Wisconsin, 1784-1860, at 13 (Laurence M. Hauptman & L. Gordon McLester III eds., 1999) ("[t]he decline of the Oneida Nation not only led most of these Indians to Wisconsin, but also prompted a sizable migration of Oneidas to Ontario, in three separate groups from 1839 to 1845"). As a result, the number of Oneidas in New York dropped from 620 in 1838 to about 200 by 1845. *Id.*

Accordingly, the record shows the great majority of Oneidas in New York sold their land and migrated from New York as intended and agreed. At the very least, the federal government intended the Oneida reservation to be diminished as the Oneidas sold their lands and removed from New York following execution of the 1838 Treaty.

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15. The Oneidas' landholdings in New York State "dwindled to 350 acres in 1890; ultimately, by 1920, only thirty-two acres continued to be held by the Oneidas." *Sherrill*, 544 U.S. at 207.

3. Historical Record of Developments After 1838

This Court in *Sherrill* reviewed the subsequent development of the former reservation lands in central New York, noting in the "different, but related, context of the diminishment of an Indian reservation that '[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use,' may create 'justifiable expectations.' " *Sherrill*, 544 U.S. at 215 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977)). Those considerations apply equally here with respect to the diminishment or disestablishment of the Oneida reservation in New York. Thus, the Court may look to (a) events that occurred after 1838 and the subsequent treatment of the area; (b) established jurisdictional patterns and the development of justifiable expectations; (c) changes in the demographics of the area; (d) maps; and (e) administrative documents. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Solem,* 465 U.S. 463*; Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud*, 430 U.S. 584. All of this evidence supports the conclusion that the United Sates intended to severely diminish, if not disestablish, the Oneida reservation by entering into the 1838 Treaty, and that these intended effects were achieved both *de facto* and *de jure*.

(a) Subsequent treatment of the area

According to historian Laurence M. Hauptman, who has been employed as a historical consultant by several tribes including the Wisconsin Oneidas, "[t]he process

of Oneida dispossession and removal had been set in motion as early as the end of the American Revolution . . . ." Laurence M. Hauptman, Conspiracy of Interests 57 (1999) (Dkt. 74-5 at 29).[16] Hauptman identifies a number of factors that contributed to the removal of the Oneidas:

- Hopeless division among the Oneidas (*id.* at 28);
- A "flood of settlement into their central New York State homeland" (*id.* at 27);
- A "vast conspiracy of interlocking forces—land and transportation interests," which led to the development of canals (including the Erie Canal), railroads and roads (*id.* at 26);
- National security concerns and forty years of tension and wars with Great Britain which had a goal of removing Indian tribes from New York State (*id.* at 21-24);

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16. Excerpts from "Conspiracy of Interests" were submitted as Exhibit C to the Affidavit of David M. Schraver dated November 10, 2000 in the *Sherrill* action, *Oneida Indian Nation v. Sherrill*, Index No. 00-CV-223 and resubmitted as part of Exhibit A to the Affidavit of David M. Schraver dated August 3, 2005 in the district court in *Oneida Indian Nation v. Madison County*, Index No. 00-CV-506. The August 3, 2005 Schraver Affidavit is identified as item # 74 on the district court docket sheet. All citations to this document and other materials included in Exhibit A to the August 3, 2005 Schraver Affidavit will read "Dkt. 74-__ at __."

- The federal government's failure to carry out its fiduciary responsibilities to the Indians (*id.* at 26).

The area from which the Oneidas removed was located within both Madison County (created in 1806) and Oneida County (created in 1798). As Oneida lands were transferred to New York State, they were surveyed and laid out in townships, which were in turn subdivided into sections and the sections into lots. These towns included Cazenovia, Fenner, Lenox, Smithfield, Stockbridge and Sullivan in Madison County and Augusta, Vernon and Verona in Oneida County. The townships were settled by non-Indians, who started churches and schools; set up banks, factories, mills and shops; established local governments, courts, post offices, police forces and fire departments; organized bands, professional societies, seminaries and fraternal societies; and by 1880 covered the area with non-Indian culture. (Dkt. 74-6 at 9 – Dkt. 74-10 at 17).

By 1890, the small remnant of Oneidas who had not removed were living among their non-Indian neighbors "off reservation." (Dkt. 74-5 at 15, 16). At all times since, the area has been treated as non-Indian except for a thirty-two acre parcel currently under BIA jurisdiction, title to which is recorded in the name of an individual Oneida Indian. (Dkt. 74-10 at 19-21). *See Sherrill*, 544 U.S. at 207, 211 n.3.

(b) Established jurisdictional patterns and justifiable expectations

First officially published in 1941 (although not widely available to the public until 1942) under the authority

of the Department of the Interior, Felix S. Cohen's Handbook of Federal Indian Law was updated and republished in 1958, 1982 and 2005 ("Cohen"). In the 1942 edition, Cohen reported that "[t]he State of New York has for 100 years or more legislated for and dealt with the Indians within its borders." Felix S. Cohen, Handbook of Federal Indian Law 419, n.22 (1942). In the chapter on New York Indians, Cohen did not even include the Oneidas in his discussion of "[t]he present status of tribal government." The reason is found in a footnote:

> The Oneidas also, by various treaties, sold all of their land, except about 350 acres, to the State, and removed to the reservation in Wisconsin procured from the Menominees by treaty with the Federal Government. The 350 acres in New York belonging to the Oneidas have long since been divided in severalty under State laws, and as a tribe these Indians are known no more in that State.

Felix S. Cohen, Federal Indian Law 966-67, n.1 (1958) (internal quote omitted); Dkt. 74-10 at 29-30; *see also* Dkt. 74-12 at 31-32.

The same conclusion had been reached by a federal court decades earlier in *United States v. Elm*, Case No. 15,048, 1877 U.S. Dist. LEXIS 44 (N.D.N.Y. Dec. 24, 1877):

> By treaties between the United States and the Six Nations, the Menomonies, and Winnebagoes in 1831 and 1838 the Six Nations acquired extensive cessions of lands in

> Wisconsin near Green Bay; and about that time the main body of the Oneidas removed to these lands. Since then, the tribal government has ceased as to those who remained in this state. . . . The 20 families which constitute the remnant of the Oneidas reside in the vicinity of their original reservation. 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.

1877 U.S. Dist LEXIS at *8-10.

Beginning in the second half of the nineteenth century, the established jurisdictional patterns in central New York were non-Indian. "[A]s a tribe [the Oneidas] are known no more in that State." Cohen (1958) at 966-67 n.1; *see also* Dkt. 74-10 at 29-30. In short, the jurisdictional patterns and justifiable expectations in the area are that the ancient state reservation was long ago disestablished or diminished.

(c) Changes in the demographics of the area

The demographics of the area changed dramatically in the decades before and after 1838. As the flood of non-Indian settlers increased, the removal of the Oneidas continued. Demographic changes are reflected in the 1870 and 1890 Censuses of Oneida and Madison Counties. (Dkt. 74-11 at 4, 13; Dkt. 74-5 at 15). By 1890,

there were 106 Oneidas living off-reservation in the area. (Dkt. 74-5 at 15). This number of Oneidas compared to 1890 populations of 42,892 in Madison County, and 122,922 in Oneida County. (Dkt. 74-11 at 24, Dkt. 74-10 at 5).

As noted in *Sherrill*, according to the 2000 census, over 99% of the population in the area is non-Indian. 544 U.S. at 211.

(d) Maps

The map of New York in *The Six Nations of New York 1892 United States Extra Census Bulletin* shows all the reservations of the Six Nations in the State, and there is no Oneida reservation. (Dkt. 74-5 at 17). The absence of an Oneida reservation is confirmed by maps issued by the United States Geologic Survey in the Department of Interior. Neither the Oneida map from the Edition of 1902 nor the Utica map from 1985 shows any Oneida reservation. By comparison, the Tully map from the Edition of 1900 and the South Onondaga map edited in 1973 both show the Onondaga Indian Reservation. (Dkt. 74-11 at 34-37). Maps of Madison County and the towns within the area of the former Oneida reservation from the 1875 Atlas of Madison County make no reference to the Oneida reservation. (*Id.* at 14-20).

The Counties acknowledge that some maps of Madison and Oneida Counties include the words "Oneida Reservation" across unbounded areas. (Dkt. 74-12 at 3-4). However, the area of the former Oneida reservation is overlaid with substantial detail of non-Indian

development, settlement, subdivisions, surveys, and local governments. General references to "Oneida Reservation" on maps, without more, have "limited interpretive value" and "cannot be said to be a considered jurisdictional statement regarding the specific status of . . . Indian lands." *Yankton Sioux Tribe*, 188 F.3d at 1029 n.11 (citations omitted).

(e) Administrative documents

The Acts of Congress and the 1838 Treaty of Buffalo Creek demonstrate the Federal Government's intent to remove the Oneidas from New York and to disestablish (or at least diminish) the Oneida reservation. In addition, the 1892 Census Bulletin (Dkt. 74-5 at 12-17) and administrative documents confirm that the Oneida reservation in New York was disestablished or diminished:

- *1877* Annual Report of the Commissioner of Indian Affairs for the Year 1877 referring to "their former reservations in the counties of Oneida and Madison." (Dkt. 74-12 at 7).

- *1891* Annual Report of the Commissioner of Indian Affairs 1891:

> The Oneida Indians have no reservation, their lands having been divided in severalty among them by act of the legislature many years ago.

* * *

> The Oneida have no tribal relations, and are without chiefs or other officers. (*Id.* at 14).

- *1893* Annual Report of the Commissioner of Indian Affairs 1893. "[The] Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land . . . divided in severalty among them and they were made citizens." (*Id.* at 16).

- *1900* Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900, Report Concerning Indians in New York:

> The Cayuga and Oneidas 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. (*Id.* at 19).

The 1901 Annual Report is to the same effect. (*Id.* at 21-24). And the 1906 Annual Report states, "[t]he New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence." (*Id.* at 26).

A letter from the Assistant Commissioner of Indian Affairs dated March 14, 1924, referring to the 1920 decision of the Second Circuit in *United States v. Boylan*, 265 F. 165 (2d. Cir. 1920)[17] advised:

> So far as this Office is aware, there is but little, if any, merit in the legal claim of the Six Nations against the State of New York for lands heretofore conveyed for valuable considerations to that State by the Oneida tribe.

(Dkt. 74-12 at 33-34).

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17. In *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd* 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921)), the district court dealt with the thirty-two acres in Madison County currently under the jurisdiction of the Bureau of Indian Affairs ("BIA"). In fact, the *Boylan* decisions recognize that the Oneida Reservation had been reduced (or diminished) and recognize that "the right was given to the Indians as a tribe to dispose of their lands in the state of New York, if they decided to move to Green Bay and there accept other lands allotted to them. After this, the Indians remaining held a single and undivided tract out of the original Oneida reservation." 265 F. at 167. The District Court's opinion in *Boylan* indicates that as of 1906, "the Oneida reservation still existed, although reduced in area." 256 F. at 481. Thereafter in the treaty of 1842, as authorized by the 1838 Treaty of Buffalo Creek, the State arranged to purchase the portion of the reservation that represented the equitable share of the Oneidas who emigrated to Green Bay in 1842. 265 F. at 168. Thus, the court recognized the effect of the treaty of 1842 as further diminishing the Oneida reservation. The *Boylan* case does not support the continued existence of the ancient Oneida Reservation acknowledged in the 1794 Treaty of Canandaigua, although it helps to explain why the thirty-two acres is currently under BIA jurisdiction.

A letter from the Assistant Commissioner of Indian Affairs dated January 7, 1925 stated:

> "Furthermore, the Oneida Indians years ago disposed of their lands in New York State and removed to a reservation in Wisconsin. As a tribe these Indians are no longer known in the State of New York." (*Id.* at 35).

Three 1939 letters confirm that the Oneida Reservation no longer exists. (*Id.* at 37-39). And more recently, the Annual Report of Indian Lands, U.S. Department of the Interior, Bureau of Indian Affairs, Table of Lands under the Jurisdiction of The Bureau of Indian Affairs as of December 31, 1997 shows no land in Oneida County, New York and only thirty-two acres in Madison County, New York. *Annual Report of Indian Lands*, U.S. Department of the Interior, Bureau of Indian Affairs (Dec. 31, 1997) available at http://web.archive.org/web/20011126092759/www.doi.gov/bia/realty/cnty97.pdf, at 12.

Except possibly for the thirty-two acres, there has been no Oneida reservation for over one hundred years; and the area has been under non-Indian jurisdiction for nearly 200 years.

E. The Court of Appeals' Conclusion That The Oneida Reservation Was Not Disestablished Or Diminished Is Historically Inaccurate and Legally Unsound.

The court of appeals did not read the historical record as this Court did in *Sherrill*, and its conclusion

that the Oneidas' 300,000-acre reservation was left undiminished is factually and legally unsupportable. As an initial matter, it dismisses the sale of 295,000 acres (and influx of non-Indians) in the 40 years before the 1838 Treaty, believing what happened to the Oneida reservation before 1838 "is not persuasive evidence that the Buffalo Creek Treaty was meant to disestablish the reservation." 337 F.3d at 164. But the premise for the 1838 Treaty was that the Oneidas had sold almost all of their reservation lands to New York State in treaties facilitated, approved, or condoned by the federal government (*see Sherrill*, 544 U.S. at 205-06; *Oneida Indian Nation*, 43 Ind. Cl. Comm. at 385-395); were on the verge of losing the remaining 5,000 acres due to the irresistible forces of settlement and development in the 1800s; and the federal government could entice the Oneidas to leave by offering them a permanent home west of the Mississippi where they would be undisturbed. 43 Ind. Cl. Comm. at 391-403. If the 295,000 acres of land next door to the 5,000 acres were still part of an undiminished Oneida reservation in 1838, the United States would not have needed to remove the Oneidas to a location half a continent away.

The court of appeals' conclusion also rests in part on a misreading of the 1838 Treaty. As an initial matter, the court of appeals curiously concluded that the 1838 Treaty did not apply to the Oneidas in New York because they had "a permanent home" within the meaning of Article 2 of the 1838 Treaty. 337 F.3d at 161, n.17. But that Article in relevant part states the Treaty will 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." JA211a. The phrase "who have no permanent homes" applies equally to Oneidas in New York, Wisconsin or elsewhere in the United States. With that universal application, there is no justification in the record, or explanation by the court of appeals, as to why New York Indians residing in New York had a "permanent home," but those residing in Wisconsin (pursuant to prior federal treaties) or elsewhere in the United States did not.

Moreover, the court of appeals' conclusion is belied by the terms of Article 13 which specifically call for the "Oneidas residing in New York" "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" (JA218a) as well as Articles 2 and 5 which reinforce the New York Oneidas' agreement to remove to "their lands in the Indian territory." The great majority of Oneidas in New York sold their property and removed to the west, as understood and agreed.

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 (337 F.3d at 161-62), is of no legal consequence. Moreover, Gillett's declaration, executed after the 1838 Treaty was signed, conflicts with the plain language of the Treaty and, even if given effect, applies only to the remaining Oneida lands as of 1838 and not to lands sold in the previous forty years through the collaboration of New York State and the federal government.

Furthermore, President Van Buren and other administration officials charged with implementing the federal removal policy certainly intended the Oneidas' reservation in New York to be diminished (if not disestablished) as the New York Oneidas sold their lands and left the State. In a report to Congress less than a year after obtaining the Oneidas' consent to the amended treaty, the Commissioner 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." JA193a.

The court of appeals also emphasized that "[t]here is no specific cession language, and no fixed-sum payment for opened land in New York . . . ." 337 F.3d. at 161. The court of appeals described the removal terms in Article 13 as "speculative future arrangements with . . . New York's governor" and observed that the "President had never fixed a time for . . . removal." *Id.* The court of appeals cited a federal surplus land act case, *Mattz v. Arnett*, 412 U.S. 481 (1973), to support the probative value of specific cession terms, noting that such language "can be helpfully probative, *particularly when buttressed by fixed compensation for the opened lands.*" 337 F.3d at 159 (emphasis added). But in *Mattz* and every other surplus land act case, the court addressed a federal statute that opened up a reservation on federal lands and had to determine whether Congress had intended to disestablish an Indian reservation when it enacted the statute.[18] In that separate context, Congress can 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 and New York held the right of preemption. *See supra* Part II.C.

Because New York State—and not the federal government—held the right to purchase the land from the Oneidas, the language of the 1838 Treaty was necessarily different from surplus land act cases involving Western tribes. The most that 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." JA218a.

The court of appeals' pre-*Sherrill* analysis rests on a misreading of history, the 1838 Treaty, and the applicable law regarding disestablishment and diminishment. The historical record shows the Oneidas "ancient" and "former" reservation was substantially diminished, if not disestablished, by the mid-nineteenth century. This Court should recognize that historical reality, rather than perpetuate a disruptive legal fiction that a "not-disestablished" reservation spans 300,000 acres (approximately 450 square miles) across central New York.

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18. Congress, in passing surplus land acts, was not implementing any policy to remove the Indians on the reservation. Rather, the tribes all remained on the land but with reduced land holdings. In that peculiar setting, Congress might or might not intend to diminish or disestablish the reservation.

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should hold that tribal sovereign immunity from suit does not bar tax foreclosure and eviction to collect lawfully-imposed property taxes on land owned in fee by an Indian tribe, and that the ancient Oneida reservation in New York has been disestablished or diminished to thirty-two acres.

Respectfully submitted,

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ADDENDA

ADDENDUM A — EXCERPTS FROM JOINT APPENDIX IN THE SUPREME COURT OF THE UNITED STATES IN *COUNTY OF YAKIMA v. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION*, OCTOBER TERM, 1990

Nos. 90-408 and 90-577
CONSOLIDATED

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Petitioner,
v.
COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals For the Ninth Circuit

JOINT APPENDIX

Addendum A

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PETITIONS FILED: 90-408, SEPTEMBER 5, 1989
AND 90-577, OCTOBER 3, 1990
CERTIORARI GRANTED APRIL 29, 1991

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COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF IN *CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION v. COUNTY OF YAKIMA,* NO. C-87-654 (E.D. WASH) DATED NOVEMBER 6, 1987 FILED NOVEMBER 9, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,

Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY, Yakima County Treasurer,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

[Filed Nov. 9, 1987]

COMES NOW the plaintiff and for cause of action against the defendants, alleges as follows:

PARTIES

I.

Addendum A

Plaintiff is a federally recognized Indian Nation pursuant to the *Treaty with the Yakimas*, 12 Stat. 951. Plaintiff brings this action on its behalf as a sovereign, tribal entity and on behalf of its members who reside within the exterior boundaries of the Yakima Indian Reservation. Plaintiff also brings this action in the place of the United States of America who through the Department of Interior/Bureau of Indian Affairs, regulates and protects the interests of plaintiff and its enrolled members.

II.

Defendant, County of Yakima, is a municipal corporation of the state of Washington. A substantial portion of plaintiff's reservation is located within Yakima County.

III.

Defendant Dale A. Gray is the duly elected treasurer of Yakima County, Washington, responsible for the collection of *ad valorem* property taxes within Yakima County, Washington.

JURISDICTION

IV.

This Court has jurisdiction over this matter and venue is proper pursuant to 26 U.S.C. Sec. 1331 as this action involves a federal question concerning a treaty

made by the United States of America, and pursuant to 28 U.S.C. Sec. 1362 as this matter involves an action by a federally recognized Indian nation.

FIRST CAUSE OF ACTION

V.

Plaintiff is a federally recognized Indian Nation with which the United States of America entered into a treaty entitled *Treaty with the Yakimas*, 12 Stat. 951. In said *Treaty with the Yakimas*, the Yakima Nation reserved from other lands ceded to the United States, lands designated as the Yakima Indian Reservation which is for the exclusive use and benefit of the Yakima Nation and its members. The Yakima Nation also retained its sovereign right to be self-governing and to make and enforce its own laws. Subsequent to said *Treaty with the Yakimas*, the Yakima Nation has maintained its tribal sovereignty and existence and continues to be self-governing, providing essential governmental services to its members and non-members within the exterior boundaries of the Yakima Indian Reservation.

VI.

In connection with its reserved powers of self-government, the Yakima Nation owns and operates a considerable amount of land within the exterior boundaries of the Yakima Indian Reservation. Title to such land is held both in a restricted trust status for the benefit of the Yakima Nation, and in unrestricted fee patent status.

Addendum A

VII.

Defendant Yakima County, by and through defendant treasurer, imposes *ad valorem* real estate taxes under the authority of RCW 84.52.010 *et seq*. Said defendants have been collecting such *ad valorem* taxes under the provisions of RCW 84.56.010 *et seq.*, RCW 84.60.010 *et seq.*, RCW 84.64.010 *et seq.*, and RCW 84.68.010 *et seq*.

VIII.

In addition to imposing *ad valorem* taxes on fee patent land owned by the Yakima Nation, defendants are also imposing *ad valorem* taxes upon fee patent land located within the Yakima Indian Reservation which is owned by enrolled members of the Yakima Nation who have not severed tribal relations.

IX.

The imposition of *ad valorem* property taxes upon fee patent land owned by the Yakima Nation and or its members violates the provisions of Article 26 of the Constitution of the State of Washington. Article 26 of the State Constitution does not permit the State or defendant County to impose *ad valorem* taxes upon real estate owned by the Yakima Nation and or its members on property owned within the Yakima Indian Reservation unless said property is owned by members of the Yakima Nation who have severed tribal relations. The imposition of *ad valorem* taxes by defendants on

fee patent land owned by the Yakima Nation and its members within the Yakima Indian Reservation is therefore, unlawful and illegal.

X.

The imposition of an *ad valorem* tax against the fee patent land of the Yakima Nation and its members intrudes upon and interferes with the ability of the Yakima Nation to make its own laws and govern itself and its members. The United States Congress has not authorized nor consented to the imposition of an *ad valorem* tax on the land of the Yakima Indian Reservation owned by the Yakima Nation and or its members. Therefore, the existing and continuing efforts by the defendants to impose and collect *ad valorem* taxes from the Yakima Nation and its members with regard to fee patent land within the boundaries of the Yakima Indian Reservation is unlawful and illegal.

XI.

The defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and or its members have a fee patent interest. Said sale is scheduled for November 20, 1987. Unless said sale is enjoined and restrained by the Court, the plaintiff and its members will suffer irreparable harm.

Addendum A

XII.

Plaintiff is entitled to a judgment declaring that fee patent land located within the Yakima Indian Reservation which is owned by the Yakima Nation and or its enrolled members who have not served their tribal relations within the boundaries of the Yakima Indian Reservation are not subject to State or County *ad valorem* taxes.

SECOND CAUSE OF ACTION

XIII.

Plaintiff realleges Paragraphs No. I through IV and Paragraphs No. V through VI as though set forth herein in full.

XIV.

The Yakima Nation and its enrolled members occasionlly sell fee patent land located within the exterior boundaries of the Yakima Indian Reservation. Defendants impose a real estate excise tax pursuant to the provisions of RCW 82.45.010 *et seq*. upon the Yakima Nation and its members in order to consummate such sales.

XI. [SIC]

The actions of the defendants regarding the imposition of an excise tax on real estate sales under

the provisions of RCW 82.45.010 *et seq*. upon the Yakima Nation and its enrolled members are invalid and illegal as such actions infringe upon the sovereignty of the Yakima Nation and its treaty reserved right to make its own laws and govern its own people. Defendants have no lawful authority to impose or collect said excise taxes. Plaintiff is entitled to a judgment declaring that the sales of fee patent land located within the exterior boundaries of the Yakima Indian Reservation by the Yakima Nation and its members are not subject to the excise tax otherwise imposed by RCW 82.45.010 *et seq*.

WHEREFORE, plaintiff prays for judgment against the defendants as follows:

1. For a temporary restraining order and an injunction against the defendants prohibiting the sale of approximately 40 parcels of real estate in which enrolled members of the Yakima Nation who have not severed their tribal relations have an interest in. [sic]

2. For an injunction against the defendants prohibiting said defendants from the levy, imposition or collection of *ad valorem* taxes upon the fee patent land of the Yakima Nation and its tribal members who have not severed tribal relations within the exterior boundaries of the Yakima Indian Reservation.

3. For an injunction against the defendants prohibiting said defendants from the levy, imposition or collection of the excise tax imposed by RCW 82.45.010 *et seq.*, for sales of real estate located within the exterior boundaries of the Yakima Indian Reservation.

4. For such other and further relief as to the Court seems just and proper.

5. For plaintiff's costs and disbursements incurred herein.

DATED this 6th day of November, 1987.

s/
TIM WEAVER
Attorney for Plaintiff

s/
R. WAYNE BJUR
Attorney for Plaintiff

STIPULATION OF FACTS FOR SUMMARY JUDGMENT IN *CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION v. COUNTY OF YAKIMA,* NO. C-87-654 (E.D. WASH) FILED APRIL 26, 1988

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,

Plaintiff,

vs.

COUNTY OF YAKIMA; and DALE A. GRAY, Yakima County Treasurer,

Defendants.

STIPULATION OF FACTS FOR SUMMARY JUDGMENT

[Filed April 26, 1988]

Pursuant to this Court's order of April 11, 1988 herein, the parties agree to and submit for the Court's consideration the following facts relating to benefits (as between State and County government on one hand and Yakima Indian Nation tribal government on the other hand) and to the pattern of fee land ownership within the Yakima Indian Reservation. The parties attorneys have reviewed each other documentary support for the

facts recited herein and find all to be prima facie valid. However, this fact stipulation is only for purposes of the pending cross-motions for summary judgment, as in such cases the facts as presented by non-moving parties are presumed to be true. In the event of a trial of this cause, the parties reserve the right to challenge and require proof of these facts according to applicable discovery and evidence rules.

LANDS, POPULATION AND OWNERSHIP

1. The Yakima Indian Reservation consists of approximately one million, three hundred thousand acres of land, located almost entirely in Yakima County.

2. The Yakima Indian Nation owns some interest in approximately seventy-five parcels of fee-patented land within the Yakima Indian Reservation. Most of these interests are fractional. The total assessed value of the partially tribal owned lands is five million, four hundred four thousand, nine hundred sixty dollars ($5,404,960). The total assessed value of the Yakima Tribe's interest in these lands is one million, two hundred fifty two thousand, seven hundred twenty six dollars ($1,252,726). The sum of ten thousand, seven hundred eighteen dollars and seventy five cents ($10,718.75) in state and local ad valorem taxes was levied by defendant Yakima County against the Yakima Nations share of these lands for the year 1987.

3. The Yakima Indian Nation has 7,604 enrolled members. Approximately 4,500 of these members reside within the boundaries of the Yakim Reservation.

Addendum A

Approximately 104 individual members of the Yakima Nation are known to own a total of 139 parcels of fee-patented land within the Yakima Indian Reservation. Of these 139 parcels, 72 are residential lots whose acreages are not known to the parties. Of these residential lots, 33 are in Toppenish, 17 in Wapato, 14 in White Swan. The remaining 67 parcels comprise a total of 1,335.68 acres, and their total assessed value is $4,580,420. The parties believe most of the individual Yakima Indian owned parcels within the Yakima Reservation have been identified and will jointly advise the Court of others, when identified, if requested by the Court.

4. A map of the Yakima Indian Reservation is submitted herewith to illustrate the locations of the fee-patented lands referred to herein. This map is marked in blue to indicate the individual Indian owned parcels hereinabove mentioned, in red to indicate those lands above mentioned in which the Yakima Tribe has interests, and the other fee-patented lands within [sic] the Reservation are colored in grey.

5. According to the most recent (1980) U.S. Census Data, the total population of the Yakima Indian Reservation is 25,363. 24,720 of these are from the Yakima County portion of the Reservation and 643 from the Klickitat County portion. The same 1980 Census showed 4,983 Indian inhabitants of the Yakima Reservation, without regard to tribal affiliation, 4,919 of whom are from the Yakima County portion of the Reservation and 64 from the Kittitas County portion.

* * * *

SELECTED AREAS OF MADISON AND ONEIDA COUNTIES