# 07-2430-CV(L)

## 07-2548 (XAP) & 07-2550 (XAP)

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**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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ONEIDA INDIAN NATION OF NEW YORK, ONEIDA TRIBE OF INDIANS OF WISCONSIN, ONEIDA OF THE THAMES,
Plaintiffs-Appellees-Cross-Appellants,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee-Cross-Appellant,

NEW YORK BROTHERTOWN INDIAN NATION,
Plaintiff-Intervenor

*v.*

COUNTY OF ONEIDA, COUNTY OF MADISON,
Defendants-Cross-Appellees,

STATE OF NEW YORK,
Defendant-Appellant-Cross-Appellee.

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On Appeal from an Order of the United States District Court
For the Northern District of New York

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Brief of the National Congress of American Indians as *Amicus Curiae* In Support of the Oneida Indian Nation of New York, Oneida Tribe of Indians of Wisconsin, Oneida of the Thames, and the United States, Supporting Affirmance In Part and Reversal in Part

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John Dossett
Virginia Davis
National Congress of
American Indians
1301 Connecticut Ave.
Washington, D.C. 20036
(202) 466-7767
(202) 466-7797 fax

Kim J. Gottschalk
Native American Rights
Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
(303) 443-7776 fax
*Attorney of Record for NCAI*

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# I. INTRODUCTION AND INTEREST OF *AMICUS*[1]

The National Congress of American Indians (NCAI) is a nationwide coalition of more than 250 Indian tribal governments. Formed in 1944 to advocate for protection of tribal rights guaranteed by treaty and federal statute, NCAI's member tribes possess millions of acres in holdings of various types as well as other valuable property rights, and commonly seek vindication of their ancient rights. NCAI is well-positioned to address the issues presented in this case.

NCAI submits this *amicus curiae* brief to provide additional historical and interpretive information regarding application of the laches doctrine to Indian claims. If adopted, the arguments advanced by New York State would set precedent that would greatly impair NCAI's member tribes' recent progress toward restoring and stabilizing their reservation lands, economies, and governments.

This brief provides: 1) historical and legal background on the sanctity of treaty rights throughout the Nation's history; 2) a discussion of federal law and policy protecting such rights from loss due to passage of time; and 3) a discussion of the practical and legal barriers facing tribes in attempting to vindicate their rights – all considerations which must be taken into account in any analysis of whether delay in the vindication of tribal rights was reasonable.

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[1]All parties have consented to the filing of this *amicus* brief.

## II. SUMMARY OF ARGUMENT

In federal Indian law, "[o]nly with a full understanding of the relevant historical backdrop can a modern court place a contested transaction in a context appropriate for decision-making."[2] The district court's ruling recognized the central importance of historical perspective and accorded proper weight to the value Congress and the courts have placed throughout our Nation's history on honoring and protecting tribal rights to land. Judge Kahn properly fashioned a non-disruptive, common-law remedy for fair compensation against the State that pre-supposed the Oneidas' loss of possession, and then held, consistent with *Cayuga*,[3] that laches is inapplicable to such a claim.[4] *Oneida Indian Nation of New York v. New York*, 500 F. Supp.2d 128 (N.D.N.Y. 2007).

Federal common law and federal statutory law have always protected aboriginal and treaty rights from loss by passage of time, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*), even where substantial

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[2] Felix S. Cohen, Handbook of Federal Indian Law, §1.01 at 8 (2005 ed.). Former Justice Frankfurter concurred: "[A]ny domain of law, but particularly the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Felix Frankfurter, Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L. Rev. 355, 356 (1954).

[3] *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. den.* 126 S. Ct. 2021 (2006).

[4] NCAI supports the United States' position that *Cayuga* was wrongly decided, while assuming *arguendo* that *Cayuga* controls. NCAI supports affirmance of the

disruption to long-established non-Indian interests results. *Winters v. United States*, 207 U.S. 564 (1908) (water); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (fishing). Federal law accords land rights more explicit protection than other categories of Indian rights. Throughout this Nation's history, Congress has retained a Non-Intercourse Act (NIA) that voids transactions of the type at issue here. 25 U.S.C. §177. This protection is enforceable at common law, *Oneida II*, which itself protects such claims from loss due to passage of time. *Id.* In addition, Congress has passed legislation ensuring that such claims cannot be barred by any statute of limitations. 28 U.S.C. §2415; *see, Oneida II.* As suits to protect such lands are actions at law, it would be "novel" to import equitable notions of laches to bar them. 470 U.S. at 245 and n. 16.

It is against this backdrop of federal protection of treaty rights, including specific Congressional protections, that any discretionary decision regarding unreasonable delay must be made. All reasons for the delay must be considered. *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1032-1033 (Fed. Cir. 1992). An evaluation of delay must begin with the recognition that, throughout this Nation's history, Indians have been subjected to a colonization process which, due in part to its fluctuations, has disrupted, impoverished, and

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fair compensation claim. If the district court holding denying claims based on

demoralized tribal societies. The historic proportions of this disruption, together with myriad practical and legal barriers to suit, render the Oneidas' actions reasonable.

Poverty, language, culture, and racism have presented formidable practical barriers to suit over the years. In addition, numerous legal barriers, such as questions about the availability of federal courts, questions concerning status to sue, and uncertainty about access to state courts have discouraged and prevented tribal resort to the courts. The district court correctly acknowledged the barriers faced by the Oneidas and the reasonableness of their actions to vindicate their rights. *Oneida Indian Nation of New York*, 500 F. Supp. 2d at 137 and n. 3.

## III. ARGUMENT

### A. The Interests of Justice and the Guiding Principles of Federal Indian Law and Policy Demand A Meaningful Remedy for the Violation of Rights Guaranteed by Federal Treaty.

In fashioning relief for the Oneidas, the district court understood and gave deference to the critical role that Indian treaties played in the development of our Nation. Indeed, the 1784 Treaty of Fort Stanwix, relied on by the court below at 146, is generally regarded as one of the seminal sources of the United States' trust and guardianship obligations to Indian tribes generally.[5] In 1789, President Washington recognized the importance of Indian treaties when he recommended to

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possessory interests is overturned, then that claim could still be pursued.

the Senate that Indian treaties, like treaties with foreign nations, required consent of that body:

> It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers, as final and conclusive, until ratified by the Sovereign or Government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians. . . .[6]

The Senate, after appointing a special investigative committee, followed President Washington's recommendation and decided that Indian treaties would require Senate consent.[7]

Indian treaties were the basic vehicle by which possession of most of this country's territory was acquired (peacefully) and the enduring principles of the federal-tribal relationship find their genesis in our early treaties with the Indian nations:

> treaty making with Indian tribes involved matters of immense scope; the transactions totaled over two billion acres and some individual treaties dealt with land cessions of tens of millions of acres. At the same time, treaties included minutiae such as the provision of scissors, sugar, needles, and hoes. Yet, out of the felt needs of the parties to the treaty negotiation process, comprehensive principles evolved: the sanctity of Indian title, the necessary dominance of the United States, the exclusion of state jurisdiction, the sovereign status of tribes, and the special trust relationship between Indian tribes and the United

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[5] Felix S. Cohen, Handbook of Federal Indian Law 60 (1982 ed.).
[6] *Id.* at 71, *quoting* 1 Annals of Cong. 80-81 (Gales & Seaton eds. 1789).
[7] *Id.*, *citing* 1 Annals of Congress at 84.

> States. These principles endured beyond the four corners of the negotiated treaties. When treaty making was ended by Congress in 1871, the same principles became embodied in the "treaty substitutes" that followed—in agreements, executive orders, and statutes.[8]

The importance of treaties recognizing the sanctity of Indian title, which has long been held "as sacred as the fee simple of the whites,"[9] forecloses any result that altogether denies redress for admittedly illegal transactions that deprived the Oneidas of their last remaining lands—to the protection of which the Nation's honor had been pledged. *See Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926) (just compensation for land promised in a treaty when it was "impossible" to grant possession); *Felix v. Patrick*, 145 U.S. 317, 333 (1892) ("impossible" to return the land sought, but recognized a remedy for recovery of the value of the scrip). The interests of justice demand that the courts, if necessary, use their inherent powers to ensure that an adequate remedy is available for so significant a transgression. That is what Judge Kahn did below, and that portion of his decision should be affirmed.

### B. Federal Law has Always Protected Aboriginal and Treaty Rights from Loss by Passage of Time.

Federal law has always protected aboriginal and treaty rights from passage-of–time defenses. The Supremacy Clause protects federal rights from state time-based defenses and borrowing such defenses in the context of Indian rights would

[8] Cohen, *supra*, at 48-49. (1982 ed.)

violate federal policy.[10] *Oneida II* at 240-241. Indian property rights have routinely been enforced in a variety of contexts despite both the passage of time and substantial impacts on non-Indians.[11]

### 1. Water Rights

The federal reservation policy began in the 1850s, and "[b]y 1858, federal policy had shifted fully from removal to concentration on fixed reservations." Felix Cohen, Federal Indian Law, 65 (2005 ed.). But that water had been reserved with the land was not decided until decades later in *Winters v. United States*, 207 U.S. 564 (1908). In the arid West, where non-Indians relied heavily on the prior–appropriation system, it was no small matter that the Supreme Court ruled, decades after creation of the reservation at issue, that an undetermined quantity of water, *i.e.*, an amount sufficient to fulfill the reservation's purposes, with a priority date of the reservation's establishment, had been reserved for Indian reservations under federal law. These reserved rights could pre-empt continued use of state-law-based water rights by non-Indians, as *Winters* itself showed.

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[9] *Mitchel v. United States*, 34 U.S. 711, 746 (1835).

[10] In most cases, Indian rights are inherent tribal rights never surrendered to anyone. *United States v. Winans*, 198 U.S. 371 (1905). They are federal rights because they are recognized and protected by federal law. *Oneida II*.

[11] The precise standards for determining when a case might fall on the side of too much disruption can be left to a later date, because the ruling below does not even approach the *Cayuga* standard.

It took another 55 years for the Court to address one method of quantifying the water reserved for Indian reservations and to clarify that reservations created by Executive Order also had reserved rights. *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*). Many issues related to tribes' water rights remain unresolved and many reservation water rights have yet to be adjudicated. The one constant is that those rights are not lost by passage of time. *Winters; Arizona I, supra.*

**2. Fishing Rights**

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), was a case brought to protect Indian fishing rights 125 years after the treaties at issue had been ratified. Virtually the entire Pacific Northwest fishing industry was comprised of non-Indian fishermen, while the take of the region's Indian fishermen, who possessed a treaty-guaranteed "right of taking fish . . . in common with all citizens of the Territory," had been reduced to 2% of the total, largely because of illegal exclusionary tactics by non-Indians aided by state officials. *Id.* at 669, 677 and ns. 14 and 22. Despite the impact on the livelihoods of numerous non-Indians and the fact that no apportionment had been contemplated at the time of the treaties, the Court held that the treaty established "approximately equal treaty and nontreaty shares." *Id.* at 685. This case is one in a series upholding treaty fishing rights. *See, e.g., United States v. Winans*, 198 U.S. 371 (1905) (right of access across private property to exercise treaty right); *Seufert*

*Bros. Co. v. United States*, 249 U.S. 194 (1919) (right to fish without paying license fees).

### 3. Land Rights

Aboriginal and treaty land rights are distinguished from other property rights, in that even more protective laws exist as to land rights. Since 1790, the NIA has protected Indian land rights. *Oneida II*, 470 U.S. at 232-233. A cause of action to vindicate those rights is not barred by any time-based defense. *Id.* at 235, 253. "Under the Supremacy Clause, state-law time bars, *e.g.*, adverse possession and laches, do not apply of their own force to Indian land title claims." *Id.* at 241, n. 13. In the context of Indian land claims, just as with other treaty rights, to borrow a state statute of limitations, as is done in other contexts, would violate federal policy. *Id.* at 241. Indeed, in New York–specific legislation granting state jurisdiction over certain civil actions, Congress made clear that state law would not apply to Indian land claims. *Id.*

In addition to the common-law rule that federal rights are not barred by passage of time, Congress has specifically addressed the issue of time limitations in Indian land claims. In 1966, Congress enacted 28 U.S.C. § 2415, establishing a special limitations period for certain contract and tort suits brought on behalf of Indians by the United States. Extended four times, *Oneida II* at 242, it excluded from any limitations period all actions "to establish the title to, or the right of

possession of, real or personal property." § 2415 (c). *See Oneida II,* 470 U.S. at 243-244 and n. 5.

Section 2415 was amended by the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976. There, "Congress for the first time imposed a statute of limitations on certain tort and contract claims for damages brought by individual Indians and Indian tribes." *Oneida II*, 470 U.S. at 242-243. The *Oneida II* Court noted that "the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations. It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances." *Id.* at 244.

In extending the time for filing certain actions and deciding to leave title claims free of any time limitations, Congress acted with full knowledge of the existence of eastern land claims. *See, e.g.*, S. Rep. No. 92-1253 (1972); H. R. Rep. No. 95-375 (1977); H. R. Rep. No. 96-807 (1980); S. Rep. No. 96-569 (1980). The Act was passed eight years after *Oneida I* and after Congress had passed legislation settling Indian land claims in Maine and Rhode Island. *Oneida II*, 470 U.S. at 253.

At hearings on § 2415, Interior's Solicitor testified, "[p]robably the largest and most complex are the land claims." H.R. Rep. No. 95-375, at 6 (1977). The

list of claims entered into the record as facing time bars absent an extension includes claims for the Oneida, the Cayuga and "[o]n behalf of: St Regis Mohawk Tribe; Claim: Non-Intercourse Act claim for recovery of tribal lands; Defendants: New York and individual titleholders." *Id.* at 24. In 1980, Assistant Secretary for Indian Affairs Forrest Gerard wrote the Senate Committee on Indian Affairs that "[t]he so-called eastern land claims . . . are also included in our claims program. This committee is well aware of the magnitude of the eastern land claims and the effect such claims are having in the jurisdictions where they may be litigated." S. Rep. No. 96-569, at 9 (1980).

The age of the claims and their impacts were well-known and considered fully. The Department of the Interior (DOI) recommended the statute's extension, citing complications from factual and legal issues for claims that "go back to the 18th and 19th centuries." *See* H.R. Rep. No. 95-375, at 6 (1977), as reprinted in 1977 U.S.C.C.A.N. 1616, 1621 (DOI Letter). Representative Foley, "concerned about the basic inequity and injustice of reaching back as far as 180 years in prosecuting Indian claims that long ago would have been extinguished by any other rule of law against any other citizens in this country," argued unsuccessfully against extending the limitations period. 123 Cong. Rec. 22, 502 (1977).

The prevailing sentiment was articulated by Representative Weiss, who supported the bill because "as a result of the numerous injustices suffered by

American Indians during the last 150 years – many at the hands of the American Government – it is incumbent on the United States to give these people – our country's first inhabitants – a full chance to redress their grievances . . . ." *Id.* at 504.

Potential local impacts were also fully discussed. Representative Hanley referred to the Oneida claims and the fear that long years of litigation could "wreck the economy of the region." *Id.* at 170. Maine's Attorney General stated that "[p]ending litigation has resulted in economic hardship and clouded titles in areas subject to claims." *Id.* at 77. After full consideration of all these factors, Congress extended the limitations period. It left § 2415(c) as it was, meaning there remains no statute of limitations on actions "to establish the title to, or the right of possession of, real or personal property."

Generally, where Congress has enacted a specific statute to cover the situation, it is wrong for a court to invoke the common-law doctrine of laches as a bar to suit. *Oneida, II,* 470 U.S. at 244. "Laches within the term of the statute is no defense at law" *United States v. Mack*, 295 U.S. 480, 489 (1935).

Thus, federal treaty and aboriginal rights have generally been vindicated even after considerable passage of time and even where significant impacts on non-Indians may result.

### C. Any Delay By Tribes In Vindicating Their Rights Is Reasonable In Light of The Substantial Practical and Legal Barriers They Have Faced.

To invoke the laches bar, a defendant must prove prejudice resulting from plaintiff's unreasonable and inexcusable delay in filing suit. *Costello v. United States*, 365 U.S. 265, 282 (1961). The court must weigh any reason given by plaintiff for the delay, weighing the facts and circumstances of each case. *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1032-1033 (Fed. Cir. 1992). This brief does not address whether defendants suffered prejudice as a result of the passage of time. Rather, it focuses on demonstrating that a full and fair examination of all the factors bearing on tribes' ability to pursue land claims reveals that any delay was reasonable. *See Oneida*, 500 F. Supp.2d 137 and n. 3.

Any analysis of whether laches bars tribal land claims must, at the very least, give great weight to the fluctuating nature of federal Indian policy. As noted earlier, "[o]nly with a full understanding of the relevant historical backdrop can a modern court place a contested transaction in a context appropriate for decision-making." Cohen, *supra*, at 8 (2005 ed.). This historical backdrop reveals two important hallmarks of federal Indian policy: first, it exerts pervasive influence over the property and lives of American Indians and their tribal governments and, second, it has been manifestly unpredictable and inconsistent over time.

Indian policy in some periods was marked by altruism, at least officially, such as during the early years of the Republic when Congress pledged that "the utmost good faith shall always be observed toward the Indian," the 1930s, when Congress enacted the Indian Reorganization Act (IRA) to revive and strengthen tribal governments, and the post-1961 self-determination period where Congress has attempted to strengthen tribal self-government and promote economic development. Cohen, *supra*, at 9-10 (2005 ed.).

In sharp contrast, other periods were marked by racism, intolerance and greed. During the period of Indian removal from the 1830s to the early 1850s, hundreds of tribes were forcibly evicted from their homelands. The relatively benign "reservation" period followed, only to be undermined beginning in the 1880s by the allotment-and-assimilation policy, which resulted in the loss of 90,000,000 acres of tribal land. Largely as a result of the 1928 Meriam Commission Report, *see* discussion *infra,* Congress sought to staunch the loss of tribal lands and strengthen tribal governmental institutions with the enactment of the Wheeler-Howard Act (Indian Reorganization Act – IRA), 48 Stat., 984-988 (1934) (codified or amended at 25 U.S.C. § 461 et seq.) in 1934. But the reforms of this brief "era" were cut short by the onset of World War II. Following the War, anti-Communist fervor swept the country and the communal nature of tribal societies and land tenure was deemed by many to be un-American. Thus ensued

the termination period of the 1950s and early '60s, in which Congress passed 13 acts stripping over 100 tribes of their trust relationship with the United States and, in most cases, of their land.[12]

In 1947, the great Indian legal scholar and philosopher Felix Cohen offered a perspective on the importance of understanding the history of these contrasting policies that should still inform the courts sixty years later:

> Only against such a background is it possible to distinguish between those cases that mark the norms and patterns of our national policy and those that illustrate the deviations and pathologies resulting from misunderstanding and corruption. It is perhaps inevitable that any high ideal should prove too hard to live by in times of stress, but when a principle has survived the stresses of many wars, financial panics, and outbreaks of chauvinism, it becomes important to distinguish the basic principle from the "scattering" forces, just as it becomes important to distinguish in physics between the principle of gravitation and the deflecting forces of air friction, air pressure, terrestrial motion, etc., that make some drop slantwise or rise instead of dropping. Indeed, it is only with some understanding of the norms of institutional conduct that one can determine whether the norms of the past are continuing to exert their influence, or whether the deviations of yesterday will become the norms of tomorrow.[13]

The district court properly noted that these fluctuating policies subjected Indians to "historic levels of disruption," Oneida, 500 F. Supp.2d at 147. This disruption had dramatic effect on tribes' ability to vindicate their rights.[14]

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[12] For the devastating effects of termination, *see* Cohen, *supra*, at 94-97 (2005 ed.).

[13] Felix Cohen, Original Indian Title, 32 Minn. L. Rev. 28, 46-47 (1947).

[14] Strong circumstantial evidence of the disruptive effect federal policy has had on Indian tribes' ability to protect their rights is provided by noting how long it took to

1. **Practical Barriers.**

**a. Social and economic disadvantages.**

Throughout most of this Nation's history Indian tribes have been severely economically disadvantaged. In 1928, the influential Meriam Commission, appointed by Secretary of the Interior Hubert Work, conducted a comprehensive study of Indians nationwide, including their economic and social conditions. The study's conclusions are replete with statements documenting the dire economic situation of most Indians. The Commission noted generally that "[a]n overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic and social system of the dominant white civilization." The Problem of Indian Administration 3 (Lewis Meriam ed., Johns Hopkins Press 1928) (Meriam Report). The Commission elaborated:

> In justice to the Indians, it should be said that many of them are living on lands from which a trained and experienced white man could scarcely wrest a reasonable living. . . . The economic basis of the . . .

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establish some of the fundamental principles of Indian law. *See, e.g., Williams v. Lee,* 358 U.S. 217 (1959) (lack of state court jurisdiction over reservation debt); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (no state taxing authority over reservation income); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (no tribal criminal jurisdiction over non-Indians); *United States v. Wheeler*, 435 U.S. 313 (1978)(tribal prosecution not a bar to later federal prosecution); *Montana v. United States*, 450 U.S. 544 (1981) (rules for tribal civil jurisdiction over non-Indians). The list could be greatly expanded. As Thoreau noted, "[s]ome circumstantial evidence is very strong, as when you find a trout in the milk." Bartlett's Familiar Quotations, Boston: Little, Brown and Company, 17th ed. 2002.

> culture of the Indians has been largely destroyed by the encroachment of white civilization. The Indians can no longer make a living as they did in the past by hunting, fishing, gathering wild products, and the extremely limited practice of primitive agriculture. The social system that evolved from their past economic life is ill-suited to the conditions that confront them. . . . They are by no means yet adjusted to the new economic and social conditions that confront them. . . . Several past policies adopted by the government in dealing with the Indians have been of a type which, if long continued, would tend to pauperize any race.

*Id.* at 5-7. Later in the Report, the Commission emphasized the government's pervasive control over vast tribal real property and the resultant dependence of the Indians on the United States for protection of tribal resources:

> The national government's guardianship of the Indian and its trust title to Indian property impose on that government the duty of protection and advancement of the Indian's interests. This duty is rendered more exacting by the unsophisticated character of the ward and his impoverished condition. The Indians, excepting a few isolated individuals far on the road to economic competency, must rely upon the government of the United States to protect their property . . . interests. These Indian property interests include not only individual claims . . . but also vast tribal resources of oil, minerals, timber and water for irrigation and power.

*Id.* at 779-780. The Report then noted shortcomings of the United States in this regard. *Id.* at 780-786. This court has similarly noted this deficiency in its *Oneida II* decision. 719 F.2d at 533 (Private enforcement favored because of federal government's poor performance of its statutory obligation to protect the Indians).

As noted by the district court in the Oneida test case:

> These forces which acted to deprive the Oneidas of their land had a similar adverse impact on the social conditions of the Oneida

> Nation. After the Revolutionary War, the Oneida Nation was extremely disorganized because of the displacements which had occurred during the many years of fighting, first against the French and later against the British. (Tr. 128). The tribe was suffering from famine and widespread alcoholism. (Tr. 130). The poverty they then experienced became locked in a vicious circle with the loss of their land.

*Oneida Indian Nation of N.Y. v. Oneida County,* 434 F. Supp. 527, 536 (N.D. N.Y. 1977), *aff'd* 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985).

**b. Access to attorneys**

In addition to tribes' poverty, the nature of Indian claims was such that few attorneys could undertake the specialized and extensive task of representing tribes. One of the leading historians (and participants) in the Indian Claims Commission proceedings wrote about the reluctance of lawyers to take on Indian claims prior to enactment of the Indian Claims Commission Act in 1946:

> [From 1881-1950, l]awyers were understandably reluctant to represent Indian clients in light of the highly specialized nature of the litigation and the small likelihood of recovery. Furthermore, many attorneys recognized that Indian grievances often arose out of concepts of a cultural and social nature not covered by customary interpretations of American law, but that these grievances deserved special recognition . . . . Apart from the problem of jurisdiction was the matter of claims which were never pressed although they might have stood a good chance of recovery in the Court of Claims. These were the cases of tribes which had inadequate funds or no funds at all with which to prepare and prosecute their cases.

Nancy Oestereich Lurie, *The Indian Claims Commission Act*, 311 ANNALS 56, 57-58 (1957).

Even where it was clear that tribes could sue, the Indian Claims Commission recognized the difficulty encountered by tribes in finding representation in the Indian Claims Commission process: "[M]any tribes had difficulty in securing legal representation. And, as always in these claims, the case work-up was tedious and time-consuming." United States Indian Claims Commission, United States Indian Claims Commission, Final Report 5 (1978).

**c. Language and culture**

Problems posed by lack of resources were exacerbated by cultural and language differences.

**i. Language.**

Until recent years, many Indians did not read , write, or speak English. In 1928, The Meriam Report found:

> [t]he fact must be remembered, however, that in some jurisdictions the Service is dealing with the first generation of Indians that has come in close contact with the white man. In some schools adult primary classes are found consisting of boys and girls in their teens who have never been to school before, who do not know how to read and write, and have to be taught English.

*Id.* at 50. And, as noted by the district court in the *Oneida* test-case:

> These problems were complicated by the Oneidas' illiteracy. Prior to 1800, at the time the great mass of their land was lost, only a few Oneidas had even a minimal ability to understand English orally.

> (Tr. 129). None could read or write. This state continued through the early 1800's, during the time of removal. (Tr. 218). In fact, up through the 1950's, a translator was needed at meetings of the Oneida Nation of Wisconsin in order to explain actions of the federal government. (Tr. 225).

434 F. Supp. at 536

In *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 114 (1938), the Court noted that "[w]hen the treaty of 1868 was made, the tribe consisted of full-blood blanket Indians, unable to read, write, or speak English." In *Fishing Vessel Ass'n*, the court noted that the treaty negotiations involved use of "`Chinook jargon' . . . imperfectly (and often not) understood by many of the Indians . . . composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms." 443 U.S. at 667, n. 10.

The transcripts of hearings held throughout Indian country to garner support for the IRA are replete with references to the use of interpreters for the Indians. Vine Deloria, Jr. ed., The Indian Reorganization Act, Congresses and Bills (2002). *See e.g.*, pp., 25,177, 220, 221,224, 259, 301, 331, 369, and 403. One Indian from San Manuel had this to say: "I have tried to explain this bill to my people . . . . Of course this is hard to explain . . . . The bill is too complicated for interpretation in Indian dialect." *Id.* at 255.

The universality of such circumstances resulted in judicial adoption of canons of construction favoring Indians in the interpretation of treaties to make up

for the vast cultural and linguistic disadvantages where one side was using its own language and the other was relying on interpreters. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979) (treaty construed not as lawyers, but as Indians would have understood); *Worcester v. Georgia*, 31 U.S. 515, 551-554 (1832).

**ii. Culture.**

Language problems were exacerbated by the lack of Indian familiarity with European culture. This Circuit has recognized that generally "tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible." *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 534 & n.9 (2d Cir. 1983) quoting Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 46 (1979). A New York Statute passed in 1796 in regard to the Brothertown Indians noted that "[T]he said Indians are liable to impositions and losses from the ignorance of the laws of this State and of the proper means of seeking redress for injuries." Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, 1796 N.Y. Laws 655, 657. These are but typical examples of cultural barriers faced by tribes throughout the Nation's history.

Indeed, it was not until enactment of the IRA in 1934, that federal policy encouraged Indian tribes to reorganize their political institutions to more

effectively deal with the outside world. And, as noted, these efforts were cut short by WWII and the ensuing policy lurch to termination after the War.

#### d. Racism and Bias.

Behind these more obvious barriers to suit, the ugly specter of racism has lurked throughout most of our history to dissuade tribes from resorting to the courts. The substantial legal barriers to suit in state court are discussed *infra*, but even assuming *arguendo* that there was no legal impediment to suit, racism still made it problematic to go to state court, and federal court was not opened to tribal claims until recently. As the Supreme Court has recognized, "[b]ecause of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

The possibility of local animosity even between non-Indians led the federal government to establish federal diversity jurisdiction early in the Nation's history. 13B, Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3601 (2d ed. 1984). But diversity jurisdiction was not available to tribes, as noted *infra,* and where Indians sought access to state court, the possibility of bias was greatly magnified. In Georgia, a 1789 statute provided:

> Be it enacted by the Representatives of the Freemen of the State of Georgia, in general Assembly met, and by the authority of the same, That from and immediately after the passing of this Act, the Creek Indians shall be considered as without the protection of this state, and *it shall be lawful for the Government and people of the same, to put to death or capture the said Indians* wheresoever they

> may be found within the limits of this state; except such tribes of the said Indians which have not or shall not hereafter commit hostilities against the people of this state, of which the commanding officer shall judge.

Rennard Strickland, Genocide-At-Law: An Historic and Contemporary View of the Native American Experience, 34 Kan. L. Rev. 713, 720 (1986). *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). Cohen documents that "[t]he laws of North Carolina, South Carolina, Georgia, Virginia, Massachusetts, and Maryland all referred to Indian slaves." Cohen, *supra*, at 17 (2005 ed.).

State courts, in those rare instances where they have been given responsibility for Indian matters, have a sad history. In Oklahoma, state courts were given an unusual amount of control over the affairs of the Five Civilized Tribes. The 1928 Meriam Report documented the sorry results of this arrangement:

> The general effect of the laws of Congress relating to the Five Civilized Tribes of Oklahoma has been to relieve them, to an unusual extent, from the supervision of the national government and to subject them to the authority of the State of Oklahoma. This deviation from the usual mode of dealing with the government's wards has, up to comparatively recent years, resulted in a flagrant example of the white man's brutal and unscrupulous domination over a weaker race.

Meriam at 798. Further, the report noted that "[s]uch experiments as have been tried in conferring jurisdiction over Indian property on the state courts have resulted in an exploitation of individual Indians. . . . . . . ." *Id.* at 756.

### 2. Legal Barriers to Suit.

In addition to formidable practical barriers, tribes have faced substantial legal barriers to bringing suit to vindicate land rights.

#### a. No Federal Court Jurisdiction.

The decision in the first case brought on behalf of an Indian tribe was rendered by the Supreme Court in 1831 on the Cherokee Nation's petition to invoke the Court's original jurisdiction to enjoin application of certain Georgia laws to the Cherokee reservation. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The Court rejected the claim that the Tribe was a foreign nation within Article III's grant of original jurisdiction to the Supreme Court. There were no other federal options available.

The Constitution authorizes federal court jurisdiction based on controversies "between Citizens of different States," Article III, Sec. 2, cl. 1, and Congress soon enacted legislation implementing such jurisdiction. Wright, Miller, & Cooper, *supra,* § 3601. But Indian tribes are not citizens of states for diversity jurisdiction purposes. *Romanella v. Howard*, 114 F.3d 15, 16 (2d Cir. 1997). Furthermore, likely defendants in Indian actions would also have been citizens of the state, thereby destroying diversity. *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

Federal question jurisdiction was not created until 1875 Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, codified as amended at 28 U.S.C. § 1331, and it took

decades for this change to benefit Indian tribes. In *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914), where defendants' title was defective because obtained in violation of federal restrictions on alienation of Indian allotments, the Court held that plaintiff could not rely on anticipated defenses to state a federal question. That holding was extended in *Deere v. New York*, 22 F.2d 851 (N.D.N.Y. 1927), *aff'd Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929) to a tribal possessory claim based on federal treaty. *See also, Seneca Nation of Indians v. Christy*, 162 U.S. 283, 289 (1896) (presence of Indian tribe as plaintiff does not make for federal question). This state of the law was not corrected until 1974 in *Oneida Indian Nation of New York v. County of Oneida,* 414 U.S. 661 (1974) (*Oneida I.)*

**b. Capacity to Sue.**

Tribes' capacity to bring suit has at times been explicitly denied, and has at best historically been surrounded by confusion. The holding in *Cherokee Nation*, *supra*, that Indian tribes could not qualify as foreign nations for purposes of invoking the original jurisdiction of the Supreme Court, while perhaps narrow in scope, cast a long shadow, in part because of Justice Marshall's broad statements:

> At the time the constitution was framed, the ideal of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. . . . This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for

> omitting to enumerate them among the parties who might sue in the courts of the union.

30 U.S. at 18.

This language suggests that tribes had no status to sue in any court. Based on his reading of *Cherokee Nation*, one Indian law scholar concluded that "Indian tribes generally could not directly enforce their rights in American courts until the last third of the twentieth century." Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 Ark. L. Rev. 77, 88-90 (1993).

Chief Justice Marshall also referred to tribes as "domestic dependent nations . . . in a state of pupilage . . . [whose] relation to the United States resembles that of a ward to his guardian." 30 U.S. at 17. This led many to conclude that Indian tribes lacked capacity to sue. Certainly, New York operated on that assumption. It enacted numerous laws requiring suits prosecuted on behalf of tribes to be prosecuted in the name of their *authorized* attorneys-the tribes or attorneys of their choosing were disqualified. *See, e.g., Jackson ex dem Van Dyke v. Reynolds*, 14 Johns 335 (N.Y. Sup. Ct. 1817); *Seneca Nation v. Appleby*, 196 N.Y. 318, 323 (1909) (lack of capacity to sue not even waivable by failure of defendant to plead it – the court has no jurisdiction).

Questions concerning tribal capacity to sue have unquestionably seriously hindered tribes' attempts to vindicate their rights.

### c. State Court Jurisdiction did not Exist or Existed Subject to Illegal Conditions.

*Worcester v. Georgia*, 31 U.S. 515, 593 (1832), held that the lands of the Cherokee reservation were outside state boundaries and Georgia's laws could therefore have no force within the reservation. This foreclosed any reasonable possibility that the Cherokee Nation would or could have appealed to the courts of that state for vindication of any land claim. General observations have already been made about the unsatisfactory state of tribal relations with the states in which they were located. *Id.*; *see, Kagama, supra*. But it was not just the justifiable fear of bias that made state court an unsatisfactory forum.

For example, New York's state courts have long been closed to Indian tribes absent special authorizing legislation. *Strong v. Waterman*, 11 Paige Ch. 607, 5 N.Y. Ch. Ann. 250 (N.Y. Ch. 1845); *Johnson v. Long Island R.R. Co.*, 56 N.E. 992 (N.Y. 1900); *King v. Warner*, 137 N.Y.S.2d 568, 569 (Sup. Ct. Suffolk County 1953). In *Seneca Nation of Indians v. Christy,* 162 U.S. 283, 289 (1896), the Court, reviewing a case brought under legislation passed in response to *Strong v. Waterman,* which authorized suit by the Seneca Nation under certain circumstances, upheld the state court's ruling that the statutory right imposed conditions under which suit could be brought. That meant that the state statute of limitations applied:

> The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the court of appeals, that it could only be brought and maintained `in the same manner and within the same time as if brought by citizens of this state in relation to their private individual property and rights.' Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make federal questions of the correct construction of the act and the bar of the statute of limitations.

162 U.S. at 289.

So Indian tribes, even when they were granted access to the courts of the state, would find their federal rights subject to state statutes of limitations, a result squarely rejected by *Oneida I,* 414 U.S. 661, 680 and n. 14 (discussing 1953 federal legislation granting New York certain jurisdiction over actions involving Indians, but making clear that state statutes of limitation would not apply to transactions or events occurring prior to September 13, 1952). Certainly, the imposition of state statutes of limitation on the bringing of tribes' land claims was powerful incentive not to bring them in state courts. The Supreme Court has, in modern times, rejected the conditioning of a tribe's access to state court on a waiver of its federal rights. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 893 (1986) (North Dakota could not condition tribes' access to state court on a waiver of sovereign immunity and submission to broad areas of state jurisdiction).

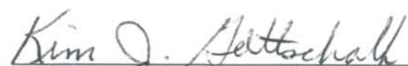
**d. No cause of action for vindication of rights until *Oneida II*.**

It was not until *Oneida II* in 1985 that it was clear that a common-law cause of action was available to vindicate rights under the NIA. The Court also held that the actions did not face any time bar. *Id.*

## IV. CONCLUSION

Federal law and policy have long protected aboriginal and treaty rights from loss due to the passage of time. Tribal land rights, recognized from the earliest days as the most important of Indian property rights, were accorded espress statutory protections by the First Congress. Recognizing this, the district court correctly held that "*Cayuga* did not foreclose Plaintiffs from bringing non-disruptive federal common law claims against the State." 500 F. Supp.2d at 140. The long history of this Nation's relations with Indian Tribes, the fact that courts have long permitted tribes to vindicate their treaty and land rights regardless of the lapse of time, and Congress' express recognition of that right in § 2415, and the non-disruptive nature of the claim, all support affirmance of the fair-compensation remedy. This part of the district court's ruling does not run afoul of *Cayuga* must be affirmed.

Respectfully submitted,

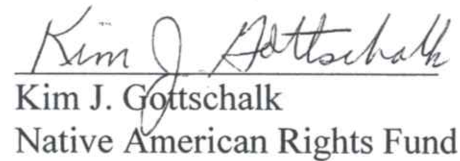


Kim J. Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760 ph.
jeronimo@narf.org
*Attorney of Record for NCAI*

John Dossett
Virginia Davis
National Congress of American
Indians
1301 Connecticut Ave.
Washington, D.C. 20036
(202) 466-7767

## CERTIFICATE OF COMPLIANCE

I certify under Federal Rule of Appellate Procedure 32(a)(7)(C) that the attached Brief of the National Congress of American Indians as *Amicus Curiae* In Support of the Oneida Indian Nation of New York, Oneida Tribe of Indians of Wisconsin, Oneida of the Thames, and the United States, Supporting Affirmance In Part and Reversal in Part is proportionately spaced, has a typeface of 14 point or more, and contains 6,889 words.

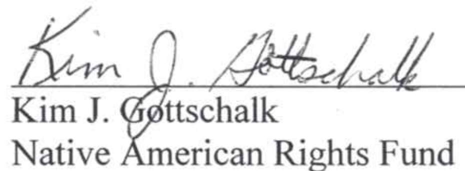


Kim J. Gottschalk
Native American Rights Fund

Attorney for Amicus National
Congress of American Indians

## ANTI-VIRUS CERTIFICATION

I certify that I have scanned for viruses, using currently updated Norton Antivirus Software, the attached PDF version of the Brief of the National Congress of American Indians as *Amicus Curiae* In Support of the Oneida Indian Nation of New York, Oneida Tribe of Indians of Wisconsin, Oneida of the Thames, and the United States, Supporting Affirmance In Part and Reversal in Part that was submitted as an email attachment to briefs@ca2.uscourts.gov and that no viruses were detected.



Kim J. Gottschalk
Native American Rights Fund

Attorney for Amicus National
Congress of American Indians

**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2007, 1 original and 9 copies of the foregoing were sent via US Mail to the Clerk of this court and 1 copy sent via U.S. Mail to counsel of record at these addresses:

Michael R. Smith
Zuckerman, Spaeder Law Firm
1800 M Street, N.W., Suite 1000
Washington, D.C. 20036-5802

Peter D. Carmen
Oneida Indian Nation
5218 Patrick Road
Verona, New York 13478

David M. Shraver
Nixon, Peabody Law Firm
P.O. Box 31051
Clinton Square
Rochester, New York 14603-1051

Andrew D. Bing
Office of the Solicitor General
The Capitol
Albany, New York 12224

Dwight A. Healy
White & Case LLP
1155 Avenue of the Americas
New York, New York 10036

Arlinda F. Locklear
4113 Jenifer Street, NW
Washington, D.C. 20015

Ronald J. Tenpas
Acting Assistant Attorney General
Craig Alexander
Elizabeth Ann Peterson
Kathryn E. Kovacs
U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795
L'Enfant Plaza Station
Washington, D.C. 20026

Kim J. Gottschalk