Legal Challenges Regarding Native Land Ownership

Curtis G. Berkey
Berkey Williams LLP
2030 Addison Street, Suite 410
Berkeley, CA 94704

July 8, 2013

One of greatest challenges of the American legal system is to find a fair and just way to address the undeniable fact that Native people are the original inhabitants of the United States. When Europeans first encountered indigenous people, it was readily apparent that their customary and traditional ways of relating to land did not fit easily into the legal categories recognized in European common law. For example, although Native communities had a sense of defined territories, those areas often were not circumscribed by demarcated boundaries, nor were they fenced. Indian people hunted over vast territories, but only at certain times of the year. Fishing camps were used only during the times that fish were plentiful. In some cases, the use and occupancy of land was controlled by particular families or clans, who allocated such uses according to oral custom and tradition.

Moreover, the relationship between Indian people to their land cannot be reduced to technical legal interests. Many Native communities view land as imbued with spiritual qualities, which may mean it cannot be alienated, mortgaged or leased under their own laws. Before Congress broke up Indian reservations in 1887 in the General Allotment Act, Native land was largely held by the Indian nation in common for the benefit of all Indians who were citizens of that nation or tribe. From the perspective of American law, perhaps the most challenging aspect of Native land tenure is the fact that rarely did such systems include written sources of law. The treaties between Indian nations and the United States, beginning in 1778, are among the earliest written documents that define Indian land rights.

Plainly, Native people view their land use and tenure systems as property in the fullest sense under their own laws and entitled to full legal protection under federal law. Whether federal law has also recognized tribal tenure systems as constituting property is a more difficult question to answer. For Indian

communities, the stakes are very high. Many Native cultures are place-based, meaning that particular places have a significance tied to origin stories, tribal histories, the power of spirits and the utility of land for the survival of the community. It is no coincidence that the destruction of Indian communities went hand in hand with the loss of tribal land. To take one distinct historical period, in 1887, Congress forcibly divided Indian reservations into 160-acre allotments to male heads of households and sold off the remaining "surplus." By the time the allotment process was stopped by Congress nearly 60 years later, Indian nations had lost more than 93 million acres. *Cohen's Handbook of Federal Indian Law*, § 1.04 at 74 (Nell Jessup Newton, ed. 2012). In large part because the territorial basis of their sovereignty had been stripped from them, traditional Indian governments were so decimated that Congress had to enact a federal law in 1934 to "reorganize" such governments under federal sponsorship and support. Indian Reorganization of 1934, 25 U.S.C. § 476 et seq.

This paper addresses two questions related to Native land ownership and tenure: 1) does the aboriginal use and occupancy by Indian nations constitute property entitled to legal protection under federal law; and 2) does federal law provide a remedy to Indian nations for violations of their land rights? Both questions contain elements of what the law *actually is* and what the law *ought to be*, as articulated in the General Principles of Law contained in *Native Land Law: The General Principles of Law Relating to Native Lands and Natural Resources*, West 2012 Lawyers Edition.

Aboriginal Title

The aboriginal title doctrine is the federal courts' effort to accommodate the claims of Indian nations as the original habitants of the land to legal protection from an alien legal system. The origin of the doctrine and its derivation from the Doctrine of Discovery as set out in *Johnson v. McIntosh*, 21 U.S. 543 (1823), is explained in Professor Lindsay Robertson's groundbreaking study, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (2005).

Establishing an aboriginal right to land requires proving certain matters of fact. The elements of proof necessary to establish aboriginal title were developed in a series of decisions by the Indian Claims Commission and Court of Claims addressing claims that the United States wrongly took Indian land during the

period 1789 to 1949. Aboriginal title vests in an Indian nation when it shows "actual, exclusive and continuous use and occupancy for a long time." *Sac and Fox Tribe of Indians of Oklahoma v. United States*, 161 Ct.Cl. 189 (1963); "This use and occupancy requirement is measured in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers." *Native Village of Eyak v. Blank,* 688 F.3d 619 (9th Cir. 2012) (internal citation omitted). It is not necessary to show that the United States or a prior sovereign recognized aboriginal use and occupancy in a treaty, statute or other form of recognition. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 669 (1974). "Aboriginal rights exist independently of grants by the sovereign." *Lipan Apache Tribe v. United States,* 180 Ct.Cl. 487, 491 (1967). Because it is often difficult for Indian litigants to obtain the evidence necessary to prove aboriginal title, the courts have adopted a liberal approach in weighing the relevant evidence. *Native of Village of Eyak v. Blank, supra* at 623.

Actual and Continuous Use

This element of aboriginal title seeks to accommodate the fact that Indian use and occupancy do not fit the traditional categories of land tenure under American law. The Supreme Court has ruled that Indian possession or occupation "was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites. . . ." *Mitchel v. United States,* 34 U.S. 711, 746 (1835); *see also, Alabama-Coushatta Tribe of Texas v. United States,* 28 Fed.Cl. 95, 107 (1993) (actual and continuous use is established by the tribe's "habits and modes" and the extent of its farming, hunting, trading and settlements). Seasonal use of an area can be sufficient to satisfy this element if "consistent with the seasonal nature of the ancestors' way of life" as, for example, marine hunters and fishers. *Native Village of Eyak v. Blank, supra* at 623.

Exclusive Use and Occupancy

The Indian nation claiming aboriginal title must also show it "used and occupied the land to the exclusion of other Indian groups." *United States v. San Ildefonso,* 513 F.2d 1383, 1394 (Ct.Cl. 1975). The exclusivity element may be proven by showing either full dominion or control; the right to expel intruders; or that other tribes using the area did so with the permission of the dominant tribe or that others' use of the land was "fleeting." *Wichita Indian Tribe v. United States,*

696 F. 2d 1378, 1385 (Fed. Cir. 1983); *Alabama-Coushatta Tribe of Texas v. United States,* 2000 WL 1013532 *28 (Fed. Cl. 2000). The exclusivity requirement is satisfied even if the tribes occupying the same land believed they jointly owned the land. *United States v. Pueblo of San Ildefonso, supra* at 1394. It is also satisfied if there is no evidence that other tribes used or occupied the area. *Id.*

For a Long Time

This element does not require proof of a fixed or definite period of time. The general rule is the use and occupancy must be long enough for the Indian nation or tribe "to transform the area into domestic territory." *Confederated Tribes of Warm Springs Reservation v. United States,* 177 Ct. Cl. 184 (1966). Further, it is not necessary that possession or use be uninterrupted for the relevant time period. "Intermittent contacts . . . which define some general boundaries of the occupied land" will suffice. *United States v. Seminole Indians of Florida,* 180 Ct. Cl. 375, 384 (1967) (periodic contacts within hunting and trading areas as evidenced by temporary camps sufficient to meet long time requirement). One tribe was able to meet this element by showing over a 30 year period a number of village residences, farming for six months of the year, trails and rivers for travel and extensive hunting and trading practices. *Alabama-Coushatta Tribe of Texas v. United States, supra* at *32-34.

Legal Incidents of Aboriginal Title

Once aboriginal title is proven, the natural question is whether the rights it affords are secure in the same way that the rights of non-Indians to their lands are legally secure. Stated another way, to what extent is land held under aboriginal title property under federal law? The courts have been schizophrenic in their answers to this fundamental question. The Supreme Court case that established the doctrine characterized aboriginal title "as sacred as the fee simple of the whites." *Johnson v. McIntosh, supra* at 574. The rule that aboriginal rights exist until expressly and affirmatively extinguished by Congress also suggests comparatively robust protection for aboriginal title lands. *United States v. Santa Fe Pacific Railroad Company,* 314 U.S. 339, 347 (1941). Yet the Supreme Court has also ruled that aboriginal title not recognized as ownership by Congress or by treaty is not entitled to Fifth Amendment protection against uncompensated takings by the United States. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955).

The legal incidents of aboriginal title suggest property-like characteristics. These include many of the same interests that comprise private property held by non-Indians, including the right to the timber, minerals, water and fish found on or in such lands. *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938); *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987). Aboriginal title also includes the right to hunt and gather in these areas. *See, e.g., United States v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979); *United States v. Minnesota*, 466 F.Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980) ("aboriginal hunting, fishing, trapping or wild ricing rights are mere incidents of Indian title, not separate from Indian title."); *State v. Coffee*, 556 P.2d 1185, 1189 (Idaho 1976) (aboriginal title includes the right to hunt and fish on those lands). These characteristics strongly suggest that land held under aboriginal title is owned in the fullest legal sense of that word. The Supreme Court has at times tended to agree. *See, Holden v. Joy*, 84 U.S. 211, 244 (1872); *United States v. Alcea Band of Tillimooks*, 329 U.S. 40, 46 (1946) (as against all but the sovereign, original Indian title was accorded the protection of complete ownership).

Accordingly, Indian nations holding land under aboriginal title may invoke property law remedies to protect such lands. For example, until lawfully extinguished by Congress, aboriginal title is protected against trespass by all parties except the United States. *Edwardsen v. Morton*, 369 F.Supp. 1359, 1371 (D. D.C. 1973) (third parties coming onto land held under aboriginal title without the consent of those "rightfully in possession" are "mere trespassers" and the Indian owners may maintain an "ordinary tort action for trespass."); *Catawba Indian Tribe of South Carolina v. South Carolina*, 865 F.2d 1444, 1448 (4th Cir. 1989) (Indian title includes a right of possession and the right to exclude all others through state law possessory actions such as ejectment and trespass.).

Constitutional Protection

Given the conceptual similarity between aboriginal title and ordinary common law property interests, it should stand to reason that this form of land tenure would be entitled to full protection as property under the Fifth Amendment to the Constitution. There is language in several Supreme Court decisions suggesting this conclusion. *See, e.g., United States v. Creek Nation*, 295 U.S. 103 (1935) (the United States may not appropriate lands held by Indian nations without

paying compensation); *Shoshone Tribe of Indians v. United States,* 299 U.S. 476, 497 (1937) (the government may not "appropriate [lands held by Indian nations] for its own use, without rendering, or assuming an obligation to render just compensation.").

However, the Supreme Court case that most directly addresses the issue concluded that, contrary to *Creek Nation* and *Shoshone Tribe*, Indian nations holding their land under aboriginal title are not entitled to compensation under the Fifth Amendment when such lands are taken by the United States. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955). Contrast the vulnerability of aboriginal title lands to uncompensated takings to the legal status of Indian lands protected by treaty or statute, which receive full constitutional protection. *United States v. Sioux Nation,* 448 U.S. 371 (1980). Thus, *Tee-Hit-Ton* stands out as perhaps the sole exception to full legal equality between lands held by Indian nations and lands held by non-Indians.

A critical analysis of the doctrinal underpinnings of *Tee-Hit-Ton* is beyond the scope of this paper, but suffice it to say that the decision has been heavily criticized by scholars and by several judges. *See, e.g.,* Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," 31 *Hastings L. J.* 1215 (1980); *Karuk Tribe of California v. Ammon,* 209 F.3d 1366, 1380 (Fed. Cir. 2000) (Judge Newman in dissent criticizing *Tee-Hit-Ton,* saying that "[i]t is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a reservation are not entitled to the constitutional protections of the Fifth Amendment."). The decision is also inconsistent with modern notions of property in other contexts. The Supreme Court has relied on the right to exclude others as the basis for recognition of constitutional property interests in land. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("[t]he hallmark of a protected property interest [in the constitutional sense] is the right to exclude others."). It has long been the law that Indian tribes holding land under aboriginal title may maintain an ejectment action against trespassers. *Marsh v. Brooks,* 49 U.S. 223, 232 (1850) (the right of ejectment "is not open to question"); *see also, Oneida Indian Nation v. County of Oneida,* 470 U.S. 226 (1985) (Indian nations may maintain trespass actions for violations of their land rights).

There is a compelling argument that the doctrinal foundations of *Tee-Hit-Ton* have been shaken by subsequent Supreme Court decisions. The decision rests

in large part on the antiquated notion that without congressional recognition, Indian rights do not exist. *Tee-Hit-Ton,* 348 U.S. at 295 ("Our conclusion . . . leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle."). There is no constitutional support for that principle, and the courts, including the Supreme Court, have steadily eroded the doctrine that the scope of congressional authority in Indian affairs is not subject to constitutional restraint. *See, e.g., Delaware Tribal Business Committee v. Weeks,* 448 U.S. 371 (1977).

Despite its inconsistency with Supreme Court decisions both before and after the decision, *Tee-Hit-Ton* has not been overruled and it remains the law today. The Supreme Court continues to cite the case in *dicta*. *Idaho v. United States,* 533 U.S. 262, 277 (2001) (noting that Congress had power under *Tee-Hit-Ton,* to extinguish Indian title "by fiat," even if Congress sought the Indian nation's consent to alteration of reservation boundaries.). The Court also refused to review the ruling of the Federal Circuit Court of Appeals that the Yurok and Karuk Tribes were not entitled to Fifth Amendment compensation for the taking of 90,000 acres of reservation land because it was held under aboriginal title). *Karuk Tribe of California v. Ammon, States,* 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied sub nom, Karuk Tribe v. United States,* 532 U.S. 941 (2001).

Although the Supreme Court appears to be willing to adhere to the *Tee-Hit-Ton* rule, a path to genuine reform may be opening in light of the United States' recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples. Judicial re-examination of *Tee-Hit-Ton* would be warranted in light of emerging norms of fundamental human rights to which the United States now subscribes. *U.N. Declaration on the Rights of Indigenous Peoples,* G.A. Res. 61/295, U.N. Doc. A/RES/61/295; U.S. State Department, *Announcement of U.S. Support for U.N. Declaration on the Rights of Indigenous Peoples,* December 16, 2010. In Article 26, ratifying nation states acknowledge the right of indigenous peoples to their lands, and affirm the obligation of such states to recognize such rights, regardless of the form of Indian land tenure.

Remedies for Violations of Indian Land Rights

As noted, for many years it was established law that the full panoply of common law remedies was available to Indian tribes alleging violations of their

land rights, whether such land was held under aboriginal title or a title recognized by treaty or statute. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 236 (1985) (discussing authorities). The only legal defect relating to aboriginal title was its lack of constitutional protection, a severe deficiency to be sure. Recently, however, without explicitly rejecting the doctrine of aboriginal title, the federal courts have erected a new and debilitating barrier to genuine legal protection for Indian lands. Now, Indian nations seeking to vindicate their land rights must prove that the claim and its remedy do not disrupt the "settled expectations" of non-Indians that their titles to Indian land, however wrongly obtained, will not be challenged.

This new equitable defense arose in the New York Indian land claims. Between 1788 and the 1840s, the State of New York acquired hundreds of thousands of acres from the Six Nations Confederacy, or Haudenosaunee, without prior authorization or subsequent approval by Congress. The historical record plainly shows that these transactions violated the Trade and Intercourse Act, first enacted in 1790, which requires such federal authorization or approval. 25 U.S.C. § 177. The statute by its terms invalidates the State's transactions, and, as a result, nullifies the titles that purportedly passed to the State and its successor owners. More than 30 years of litigation by the Indian nation plaintiffs, including two Supreme Court decisions, had established a right to trespass damages despite the long passage of time between the loss of the land and the modern-day suits. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (upholding federal question jurisdiction); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985) (upholding common law right of action for trespass damages and rejecting defenses of federal or state statute of limitations, abatement, preemption, and ratification). In 2002**,** the Oneida Indian Nation obtained a judgment in the amount of approximately $34,000 against the Counties of Madison and Oneida for trespass on approximately 860 acres, the title to which was traced to New York State's acquisition of Oneida land in violation of the Trade and Intercourse Act in 1795. *Oneida Indian Nation of New York v. County of Oneida,* 217 F.Supp.2d 292 (N.D. N.Y. 2002). In 2001**,** the Cayuga Nation obtained a judgment against the State of New York in the amount of $248 million for its taking of 64,000 acres of Cayuga land in violation of the Act. *Cayuga Indian Nation v. Pataki,* 165 F.Supp.2d 266 (N.D. N.Y. 2001).

While the *Cayuga* decision was pending on appeal to the Second Circuit, the Supreme Court decided *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197

(2005). The case did not involve Indian land claims, but it was to have a dramatic effect on the viability of such claims. In *Sherrill*, the Court ruled that the Oneida Nation could not assert immunity from real property taxes on 17,000 acres it had purchased on the open market within its original reservation as established by the Treaty of Canandaigua of 1794. The Court concluded that it would be unfair to local governments and the State to allow an assertion of tax immunity more than 200 years after the reacquired land had been lost. Based on an amalgam of the doctrines of laches, acquiescence and impossibility, Justice Ginsburg, writing for an eight Justice majority, ruled that it would be inequitable to allow the Oneidas to assert a tax immunity claim because, for two centuries, the State and the City of Sherrill had developed "justifiable expectations" that their sovereignty over the parcels would not be disturbed. The Court undertook no analysis of the "fairness" of the unprecedented application of this new doctrine of "disruption" to the settled expectations of the Oneida Nation.

Because, as shown below, *Sherrill* has been applied by the lower federal courts to nearly wipe out more than 30 years of Indian land claims decisions favoring tribes, the Court's path to this extraordinary ruling warrants close scrutiny. The decision is anomalous in both procedural and substantive ways. First, the question answered by the Court–is it fair to allow the Oneidas to assert real property tax immunity for parcels that they had not owned for two centuries–had not been litigated in the lower federal courts in this case. In fact, the City almost certainly had waived the issue of the effect of the passage of time, as Justice Steven's dissent noted. *City of Sherrill, supra* at 225, n.5. The district court had refused to grant the City's request to add the defense of laches to its answer on the grounds of futility and the court of appeals affirmed that ruling. *Oneida Indian Nation v. City of Sherrill,* 337 F.3d 139, 168 (2d Cir. 2003). The City did not raise the issue in its petition for review in the Supreme Court. Nor was an impossibility defense preserved for Supreme Court review, and the acquiescence defense was not raised at any time in the proceedings in the district court or court of appeals.

The issue of the effect of the passage of time was raised at oral argument, but injecting the issue in the case at that late stage of course deprived the Oneidas of an opportunity to develop the factual record of their efforts to reclaim the lost lands and to assert jurisdiction and sovereignty during the period of time the Supreme Court *post hoc* determined was dispositive. Thus, in *Sherrill*, the Court stepped outside its traditional function of deciding questions of law on a factual record compiled by the courts below in accordance with fundamental notions of

due process, the rules of civil procedure and rules of evidence. For one of the few times in its history, the Court acted as a trier of fact, a role made all the more extraordinary by the Court's failure to accord the parties the basic due process right of the opportunity to be heard on dispositive issues.

The Court's unorthodox approach may have foreordained the outcome. The Court's conclusion that equitable doctrines of laches, acquiescence and impossibility bar the Oneidas' tax immunity claim was based on the following "facts:" the Oneidas voluntarily "relinquished the reins of government" at some unspecified time and by some unspecified act; since the 1850s, "most" of the Oneidas have resided outside their aboriginal territory; the United States "largely accepted or was indifferent to" New York State's jurisdiction over the land; and the lands at issue were "converted from wilderness" in the hands of the Oneidas to become "cities like Sherrill." 544 U.S. at 215. (As to this last point, the ethnocentrism of the notion that land occupied and owned by Indian people is wilderness until settled and developed by Europeans should have no place in Supreme Court jurisprudence). The evidence in support of these findings is notably absent from Justice Ginsburg's opinion. From the untested and unproven facts, it was a short path to the ultimate conclusion that the State and the City had "justifiable expectations" that their sovereignty would not be disrupted by tribal tax immunity claims.

Substantively, *Sherrill* rests on equally shaky ground. For example, the laches ruling, which is based on prejudicial unreasonable delay, ignored the fact that until recently the Oneidas were precluded by the courts from pursuing their claims in federal court. The federal courts were not open to hear tribal claims to land under the Trade and Intercourse Act until 1974. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Before 1948, tribal jurisdiction was tied to land ownership. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (For most of the Nation's history, Indian lands "were judicially defined to include only those lands in which the Indians held some form of property interest."). In 1948, Congress for the first time established the principle that for jurisdiction purposes, Indian country included all lands within reservation boundaries, regardless of who owned them. 18 U.S.C. § 1151. The Oneidas can hardly be faulted for not asserting jurisdiction over lost lands when the courts were not open to recover them or when the law provided no basis for asserting jurisdiction over them until 1948.

Regardless of the questionable basis of *Sherrill*, the Second Circuit Court of Appeals has not hesitated to extend the equitable defense announced there to tribal claims under the Trade and Intercourse Act. In *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2006), the circuit court overturned the $248 million judgment awarded by the district court for the State's violations of the Act. Although the Supreme Court was careful to note that its ruling in *Sherrill* did not disturb the holding in *Oneida* that federal law recognized a common law right of action to vindicate aboriginal land rights violated by the State in 1795, 544 U.S. at 221, the circuit court concluded that *Sherrill* had "dramatically altered the legal landscape" applicable to Indian land claims. The court distilled the following rule from *Sherrill*: "[e]quitable doctrines, such as laches, acquiescence and impossibility may, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." 413 F.3d. at 273. The court found that the facts of *Cayuga* presented such a circumstance because the Nation's claim was premised on having a possessory interest in the subject land, even though the Nation had eschewed ejectment as a remedy and sought only money damages. Claims based on vindication of possessory interests, the court said, are inherently disruptive of the settled expectations of the non-Indian land owners. The Supreme Court declined to review the ruling. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2006), *cert. denied*, 547 U.S. 1128 (2006).

In response to *Cayuga*, the Oneida Nation argued that laches did not bar its claims because it had not unreasonably delayed in filing its land claim in light of its persistent and long-standing efforts to protest the loss of its lands and assert the claim at every available opportunity. In the alternative, the Nation asserted a claim for reformation of the contracts under which the State acquired its lands, seeking compensation based on the difference between the amount the State paid and the fair market value of the lands at the time, a discrepancy that was unconscionably vast. Under this theory, the Oneidas did not challenge the legality of the original land transactions.

Neither of these approaches was successful. In *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), the second circuit ruled that the *Sherrill* equitable defense barred the Oneidas' possessory claim for trespass damages. Refashioning the *Cayuga* laches doctrine, the court concluded that the Oneidas' efforts to keep their claim alive were legally irrelevant because under *Sherrill* the defendants were not required to satisfy the elements of the traditional

laches defense of prejudicial and unreasonable delay. Rather, laches was nothing more than a "convenient short-hand for the equitable principles at stake in this case," however imprecise the term may be from the perspective of an Indian litigant required to respond to the defense. 617 F.3d at 127.

In the court's reworking of the applicable law, the *Sherrill* equitable defense "drew upon laches and other equitable doctrines derived from general principles of federal Indian law and federal equity practice" that the court did not identify. 617 F.3d at 128 (internal citations omitted). According to the second circuit, *Cayuga* applied "not a traditional laches defense, but rather distinct, albeit related, equitable considerations that it drew from *Sherrill*." *Id.* After *Oneida* the, the law appears to be that Indian land claims may be subject to unspecified "equitable doctrines," the origin of which cannot be precisely identified, but which may be derived from unspecified "general principles of federal Indian law and federal equity practice."

The Oneidas' alternate nonpossessory theory was rejected because it, too, was found to be an "ancient land claim that [is] disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief." 617 F.3d at 135. The court found the dispositive question to be not whether the claim and remedy seek to dispossess the non-Indian landowners, but whether the claim is "inherently disruptive," a determination untethered from any applicable principle of law or equity. 617 F.3d at 136. The Supreme Court also refused to review this ruling. *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114 (2d Cir. 2010), *cert. denied,* 132 S.Ct. 452 (2011).

The nadir of tribal efforts to use the federal judicial system to recover lands lost generations ago may have come in the case of the Onondaga Nation in New York. The Nation filed its claim several weeks before *Sherrill* was decided, but it had framed the complaint and remedy in the least disruptive way possible. The Nation sought only a declaratory judgment that the State's acquisition of its lands between 1788 and 1822 had violated the Trade and Intercourse Act, and as a result, the Nation retained underlying title to such lands. The Nation sought no coercive relief of any kind. The Nation did not seek possession of its lost lands, and asked for no relief that would have resulted in the dispossession of any landowners. Nor did it seek trespass damages or compensation for the injury to its lands. The Nation's strategy was to seek a declaratory judgment that could serve as the basis

of a negotiated settlement, an approach in fact suggested by the State when the Nation first approached it seeking an out-of-court resolution of its claim.

Despite the narrow scope of the claim and remedy, both the federal district court and the second circuit court of appeals summarily dismissed the Onondagas' claims, without an evidentiary hearing about whether the facts made it appropriate to apply *Sherrill's* equitable defense. *Onondaga Nation v. State of New York*, 2010 WL 3806492 (N.D. N.Y 2010). The court read *Sherrill* as requiring dismissal of disruptive Indian land claims even when the claim is viable and has been filed within the applicable statute of limitations. *Id.* at *5. The court concluded that the Onondagas' claims "represented the type of inherently disruptive action which *Cayuga* instructs is barred under *Sherrill's* formulation of the laches defense" because the claims upset the "settled expectations" of the current landowners. *Id.* at *7. The second circuit affirmed in a summary order. 500 Fed.Appx. 87 (2d Cir. 2012). If the Supreme Court denies the Onondagas' petition for certiorari, the Mohawk land claim will be the final pending claim under the Trade and Intercourse Act. *See, Canadian St. Regis Band of Mohawk Indians v. State of New York*, 278 F.Supp.2d 313 (N.D. N.Y. 2003) (striking certain affirmative defenses). Recently, the federal magistrate judge recommended that one part of the Mohawks' claim should survive a motion to dismiss based on *Sherrill, Cayuga* and *Oneida.* That recommendation is under review by the federal district court judge.

Conclusion

In 1790, President George Washington promised the Six Nations Confederacy that the federal courts would be open to them to hear "any just cause of complaint" related to their lands. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 238 n.8. *Tee-Hit-Ton* and *Sherrill* raise serious questions about whether President Washington's promise will be fulfilled. The courts' invocation of a novel legal standard for judging the legal sufficiency of Indian land claims, at a stage of the case where a robust response by the Indian plaintiff was virtually impossible, strongly suggests that Indian nations and tribes may be well-advised to seek recovery of their lands outside the judicial system. Congress has often played a prominent role in defining the legal and political relationship between Indian nations on the one hand and the federal government and state governments on the other. The time may have come for Indian nations to turn to Congress for justice for the loss of their lands, even though the current political climate may be inhospitable to such claims.