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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CAYUGA INDIAN NATION OF NEW YORK,
Plaintiff-Appellee-Cross-Appellant,

SENECA-CAYUGA TRIBE OF OKLAHOMA,
Plaintiff-Intervenor-Appellee-Cross-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee

v.

GEORGE PATAKI, GOVERNOR, ET AL.
Defendants-Appellants-Cross-Appellees.

AMICUS BRIEF OF ST. REGIS MOHAWK TRIBE AND MOHAWK COUNCIL OF AKWESASNE IN SUPPORT OF CAYUGA INDIAN NATION OF NEW YORK AND SENECA-CAYUGA TRIBE OF OKLAHOMA PETITION FOR REHEARING AND REHEARING EN BANC

Marsha Kostura Schmidt
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282
Counsel for the St. Regis Mohawk Tribe
and other Amici

Of Counsel
F. Michael Willis
August 22, 2005

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INTEREST OF AMICI

The St. Regis Mohawk Tribe and the Mohawk Council of Akwesasne ("Amici") are two of the three plaintiffs with a land claim pending before the Northern District of New York, a claim similar to that filed by the Cayuga Indian Nation and the Seneca-Cayuga Tribe and as such the Amici are subject to this court's ruling on the Cayuga claims. *See Canadian St. Regis Band of Indians v. New York*, 82-cv-783, 82-cv-1114, 89-cv-829.[1] Because this court's June 28, 2005, ruling is of extraordinary importance to tribes in New York and because that ruling conflicts with federal law, Amici file this amicus brief in support of the petition for rehearing and rehearing en banc.

ARGUMENT

The Language and Legislative History of 28 U.S.C. § 2415 Suggests that Congress Understood that Indian Land Claims Survived the Passage of Time and Enacted a Law Recognizing Their Continued Validity.

1. The Enactment of § 2415 Set an Accrual Date on the Indian Land Claims.

When Congress enacted 28 U.S.C. § 2415(b) and the Indian Claims Limitation Act of 1982, 28 U.S.C. § 2415 note, it set the deadline by which Indian trespass claims for money damages had to be filed and defined the accrual dates for Indian land claims as of the date of the enactment of § 2415. This Court's ruling directly contravenes Congress' intention in regard to claims for money damages for ancient claims. Federal courts are not free to adopt common law rules that conflict with statutory schemes. *Milwaukee v.*

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[1] The St. Regis Mohawk Tribe is a federally recognized tribe. The Mohawk Council of Akwesasne is a tribal government recognized in Canada.

Illinois, 451 U.S. 304, 314-15 (1981); *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981). In this case, that statutory scheme is found at 28 U.S.C. § 2415.

Section 2415(b) sets forth the statute of limitations for claims brought by the United States on behalf of Indian tribes, and also claims brought by tribes directly, sounding in tort, for trespass on Indian lands, including claims for trespass and money damages. Section 2415(b) permits claims to be brought "within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe ... which accrued on the date of enactment of this Act in accordance with section (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitations Act of 1982."

Prior to 1966 the United States was not subject to any statute of limitations on claims at law. In order to address this perceived inequity, in 1966 Congress enacted 28 U.S.C. § 2415 which set forth a statute of limitations for claims by the United States including claims the U.S. could bring on behalf of tribes for tort or contract.[2] Initially, the law provided for a six year statute of limitations, which would have expired in 1972. In that same year, the Department of the Interior (DOI) asked that the limitations be extended so that some "very complicated and substantial claims for damages" not become barred. S. Rep. No. 92-1253 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3592, 3593. Congress extended the limitations period three times to 1982 giving the DOI and the Department of Justice (DOJ) over fifteen years to identify ancient Indian claims so that they would not be cut off by the statute of limitations. Congress further intended that to

[2] In *Oneida Indian Nation v. County of Oneida*, 470 U.S. 226 (1985)(*Oneida II*), the Supreme Court concluded that "neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied," 470 U.S. at 253, even though they dated 1795.

the extent possible these claims should be settled by negotiation or heard in a court of law as appropriate despite the fact that the events surrounding the claims occurred 200 years ago.

Once enacted, the 1982 Indian Claims Limitation Act became a tolling statute for Indian claims. It specifically preserves claims and prevents the running of the statute of limitations.

> "*Any right of action shall be barred sixty days after the date of the publication of the list* required by section 4(c) of this Act for those pre-1966 claims which, *but for the provisions of this Act,* would have been barred by section 2415 of title 28, United States Code, unless such claims are included on either of the lists required by section 3 or 4(c) of this Act."

28 U.S.C. 2415 note, Sec. 5.

Significantly, § 2415(b) establishes the accrual date for these claims. It provides "an action to recover damages resulting from a trespass . . . which accrued on the date of enactment of this Act in accordance with section (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982. . . ." Section 2415 (g) provides that "Any right of action subject to the provisions of this section which accrued prior to the date of the enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of the enactment of this Act."

2. The legislative history sets forth Congress' clear intent with regard to these claims. During the extensive debates regarding the extensions of the limitations period, members of Congress recognized that their actions were in effect acknowledging the existence and validity of these ancient claims. The purpose of identifying the claims was

to ensure that the United States carried out its trust duty to protect the interests of tribes.[3] For example, in 1972 the Department of the Interior reported to the Senate that,

> "We believe it is particularly important not to let these unidentified claims lapse because we are on the verge of making substantial progress in discharging our trust responsibilities with regard to Indian resources. . . . S.3377 would do more than merely 'save' those claims that would be barred on July 18, 1972. It would establish an 11-year statute of limitations for all Indian claims arising under 28 U.S.C. 2415."

S. Rep. No. 92-1253 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3592, 3595.

In 1977, when Congress once again addressed extending the statute to give the DOI and DOJ time to identify all Indians claims, the debate in Congress reveals that the members were well aware of the nature of the claims, the fact that they were old, and the fact that they could disrupt communities.

Rep. Foley argued against the extension on the ground that "Long after the statute of limitations would have barred any possible actions for trespass ... we are keeping alive Indian claims, and we are allowing their resuscitation and indeed their prosecution by the full weight of the federal government ..." 123 Cong. Rec. 22500 (1977). He further stated that "I believe that even among those who for various reasons feel compelled to support the bill are concerned about the basic inequity and injustice of reaching back as far as 180

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[3] A major concern of the Congress was the possibility that tribes could bring suit against the U.S. for failure to prosecute their claims if the claims were not saved from the statute. *See*, e.g., 123 Cong. Rec. 22171 (1977)("These claims which have not been brought because tribes did not know they could be brought or because the Departments of Justice and Interior did not have the resources to prepare and file them should not now be precluded because Congress suddenly is impatient with Indian claims. . . . As trustee, the Congress and the Executive have responsibility to see that Indian legal rights are protected. Under existing law this means that all Indian tort and contract claims under 28 U.S.C. § 2415 must be filed by July 18 unless the statutory deadline is extended. It is very likely that the United States would be liable for damages for breach of fiduciary trust if such claims are not timely filed.")

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." *Id.* at 22502.

On the other hand, Rep. Weiss 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. . . . [T]his measure does not side with the Indian nations on these claims; it merely helps assure that these claims are decided fairly and equitably." *Id.* at 22171. Similarly, Rep. Risenhoover stated, "We should not let this artificial, man-made barrier--the statute of limitations--run out until we are satisfied that all claims are fully reviewed and until this Government has faithfully performed its stewardship." *Id.* at 22504.

House Report No. 95-375 (1977)[4] elaborates on the massive efforts undertaken by DOI and DOJ to investigate potential claims. One of the important issues cited by DOI in recommending an extension of the statute of limitations was the complications of factual and legal development for claims that "go back to the 18th and 19th centuries." *See Id.* at 1621 (letter from DOI stating the agency's views). Indeed, during this time period, the Justice Department was concerned that the statute would impact the land claims brought in Maine and considered a bill to toll the statute for the benefit the Maine Indians. *See id.* at 1623 (letter from DOJ stating the agency's views).

In 1980 the debate continued as DOI and DOJ requested yet another extension of the statute of limitations. Rep. Mitchell pointed out that "The original purpose of the

[4] *Reprinted in* 1977 U.S.C.C.A.N. 1616.

statute was to settle once and for all, pre-1966 Indian tribal claims involving monetary damages." 126 Cong. Rec. 5746 (1980).

Rep. Danielson noted that "as recently as 1966 there was no statute of limitations whatever upon actions brought by the U.S. Government on behalf of its wards, the Indians, none whatsoever. A claim could be 1 year old, or 10 years old, or 50 years old, or 100 years old. The statute of limitations did not run against the U.S. Government in actions which it brought." *Id.* at 5744-5745.

3. The panel's decision conflicts with Congressional intent. In considering this same legislative history, the Supreme Court in *Oneida II*, declined to follow the general rule that the federal common law borrows analogous state statutes of limitations, because "the borrowing of a state limitations period in these cases would be inconsistent with federal policy." 470 U.S. at 241. The Court concluded 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.

When reading the provisions of § 2415 and the Indian Claims Limitation Act together, the reference to the accrual language indicates Congress' understanding that the events leading to these claims may have occurred long ago and that it was necessary to identify the date from which the claim would be measured for limitations purposes. Thus, by operation of law, even if events in the land claim occurred many years ago, the claim is deemed to have accrued in 1982 if that claim appears on the list compiled by the Secretary.

The panel decision that the federal common law of laches bars tribal damages claims conflicts with this congressional policy and conclusion. The same principles rendering the state statute of limitations inapplicable in *Oneida II* preclude the application of laches. Having established an accrual date for trespass claims for money damages, there is no room for a federal common law rule to the contrary.

This statute and the extensive legislative history establishes that Congress believed it was acting to preserve these ancient claims in so far as they presented a claim for money damages. Indeed, if this were not the case then this court would have to find that Congress, DOI, and DOJ were all acting under a false assumption since they all sought to develop a list of Indian claims, even ancient ones which, once recognized, could not be barred by § 2415. It would have been a major act of futility for these agencies to spend over 15 years working to identify possible claims to save them from the statute of limitations only to have this court dismiss the claims on the ground that they are barred by laches. Congress could not have intended this result when it extended § 2415 and then codified the list of claims under the Indian Claims Limitation Act of 1982.

Respectfully submitted,

Marsha Kostura Schmidt
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282
Counsel for the St. Regis Mohawk Tribe
and other Amici

Of Counsel
F. Michael Willis
August 22, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 22th day of August 2005 I served by first class mail, postage prepaid and electronically via email, the Amicus Brief of the St. Regis Mohawk Tribe of New York and the Mohawk Council of Akwesasne upon the following:

Howard Zwickel, Esq.
Asst. Attorney General
State of New York
The Capitol
Albany New York, NY 12224

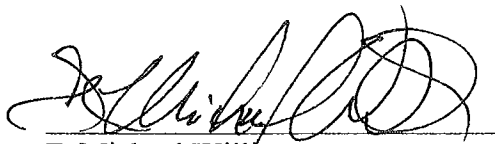
Martin R. Gold, Esq
Sonnenschein, Nath & Rosenthal
1221 Avenue of the Americas
New York, NY 10021

Gus. P. Coldebella
Mark S. Puzella
Goodwin Procter, LLP
Exchange Place
Boston MA 02109

Glenn M. Feldman, Esq.
Marsical, Weeks, McIntyre & Friedlander
2901 North Central Avenue
Suite 200
Phoenix, AZ 85012

William Dorr
Harris Beach LLP
099 Garnsey Road
Pittsford, NY 14534

Todd Kim
United States Department of Justice
U.S. Department of Justice
P.O. Box 23795
L'Enfant Plaza Street
Washington, DC 20026



F. Michael Willis