

02-6111(L)

02-6130(con), 02-6140(con), 02-6200(con), 02-6211(con), 02-6219(con),
02-6301(con), 02-6131(xap), 02-6151(xap) & 02-6309(xap)

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 E. PATAKI, as Governor of the State of New York, et al.,
CAYUGA COUNTY and SENECA COUNTY,
MILLER BREWING COMPANY, et al.,
Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**UNITED STATES' PETITION FOR PANEL REHEARING AND
PETITION FOR REHEARING EN BANC**

KELLY A. JOHNSON
Acting Assistant Attorney General

ROGER R. MARTELLA, JR.
TODD S. KIM
Attorneys, U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026
(202) 514-2762

The United States petitions for panel rehearing and rehearing en banc in this suit to compensate successors of the ancient Cayuga Nation fairly for the State of New York's unlawful acquisition of the Cayuga Reservation in violation of the Nonintercourse Act (NIA). The Supreme Court's Oneida decisions established that "Congress' clear policy" embodied in the NIA was that no "entity should purchase Indian land without the acquiescence of the Federal Government," with those who violate this rule subject to suits for damages to vindicate unextinguished tribal property rights. County of Oneida v. Oneida Indian Nation (Oneida II), 470 U.S. 226, 232-50 (1985); see Oneida Indian Nation v. County of Oneida (Oneida I), 414 U.S. 661, 666-82 (1974). Based on these decisions, many tribes have pursued land claims in lengthy and hard-fought federal litigation. The district court here awarded two tribal plaintiffs and the United States, as plaintiff-intervenor, about \$248 million in damages to be paid by the State as full compensation for the lost Reservation.

With one judge dissenting, a panel of this Court reversed, holding that laches bars these claims altogether. That holding conflicts with this Court's decision in Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982). The majority concluded that this decision had been effectively overruled by the Supreme Court's intervening decision in City of Sherrill v. Oneida Indian Nation, 125 S. Ct. 1478 (2005), which held that equitable considerations barred a tribe from asserting tax immunity regarding ancient reservation land reacquired on the open market. The majority's conclusion is incorrect. The Court in Sherrill expressly did not disturb its rulings in the Oneida cases involving damages claims like those at issue here, and it expressed approval of the district court's approach of allowing damages against the wrongdoer but not dispossession of innocent residents. The majority's application

of laches is unprecedented and contrary to explicit statutory language. So too is the majority's further holding that laches applies here even against the United States as plaintiff-intervenor. As the dissent explains, both holdings are incorrect and thus rehearing by the panel is appropriate. Rehearing en banc is also appropriate under Federal Rule of Appellate Procedure 35. First, the decision conflicts with numerous decisions of the Supreme Court and this Court. Second, the proceeding involves questions of exceptional importance: (1) whether the land claim cases that have been fiercely litigated in this Court and the district courts for thirty years based on the Supreme Court's Oneida decisions have been doomed from inception; and (2) whether the United States can be subject to laches when it seeks to enforce a federal statute in a manner consistent with the applicable statute of limitations.

BACKGROUND

1. Statutory background. — In 1790, Congress enacted the first of the Trade and Intercourse Acts that have long embodied the essential features of federal Indian policy and that included the first NIA. Special Appendix (SPA) 636. In its form in 1793, the NIA read: “no purchase or grant of lands” from Indian tribes “shall be of any validity in law or equity” unless “made by a treaty or convention entered into pursuant to the constitution.” SPA638. The NIA remains effective today. 25 U.S.C.

177. As the Supreme Court has explained:

The obvious purpose [of the NIA] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government * * * to vacate any disposition of their lands made without its consent.

Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

2. Factual background. — In 1789, the Cayuga Nation ceded 1600 square miles to the State but retained a 64,000-acre Reservation. SPA155; SPA632–33. Soon thereafter, Congress enacted the first NIA to protect such tribal land. SPA636. Then, in 1794, the United States in the Treaty of Canandaigua “acknowledge[d] the lands reserved” to the Cayugas “to be their property” and guaranteed that the Reservation “shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.” SPA180–81; SPA676–79. Nonetheless, in 1795 and 1807 treaties, the State acquired the Reservation in violation of the NIA. SPA184–229; cf. Oneida II, 470 U.S. at 232 (noting how the State ignored federal warnings regarding the NIA). Acting in bad faith, the State paid little for the destitute Cayugas’ land and quickly resold it at many times the purchase price. SPA184–229.

After the 1795 and 1807 treaties, the Cayugas had no homeland and scattered in various groups. SPA227; Appendix (A) 7197–7203. In the following years, the Cayugas attempted to obtain fair compensation. SPA230–32. The State repeatedly rebuffed the Cayugas while recognizing that it had a “moral obligation” given the unfairness of the 1795 and 1807 treaties. SPA230–32. Throughout this period, the Cayugas had no effective recourse against the State in federal or state court. SPA232. That changed in 1974 with the Supreme Court’s landmark holding in Oneida I that tribes present federal questions within federal jurisdiction when asserting “possessory rights * * * to their aboriginal lands, particularly when confirmed by treaty.” 414 U.S. at 667. After this decision, the Cayugas again attempted to settle with the State and filed this suit only after that attempt failed. SPA480.

2. Procedural background. — In 1980, the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma sued the State, Seneca and Cayuga

Counties, and a class of landowners. A204–29; A342–49. Their complaints asserted the invalidity of the 1795 and 1807 treaties under the NIA and sought relief including ejectment of the current occupants of the land that was their Reservation and trespass damages in the amount of fair rental value for the period of dispossession. Over the following years, the court denied motions to dismiss and granted the Cayugas summary judgment on various liability issues. SPA527–90. In 1992, the United States intervened as a plaintiff. A2588–89. Its motion for intervention made clear that, “[u]nder [the NIA], the United States has a legal interest in protecting any property in which the Cayugas have an interest.” A2583. It asserted that it acted both pursuant to its “trust relationship with the Cayugas” and “on its own behalf.” A2583.

After lengthy settlement attempts failed, the court turned to remedies issues. In 1999, it rejected the remedy of ejectment. SPA453–86. It stated: “monetary damages will produce results which are as satisfactory to the Cayugas as those which they could properly derive from ejectment.” SPA478–79. The court deemed the Cayugas’ delay in seeking ejectment “not completely unreasonable, when * * * tak[ing] into account the efforts to reclaim their homeland which the Cayugas have made over the years.” SPA480. Still, the court could not “overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment” given the intervening improvements on the land. SPA481. The court thus concluded: “even though some delay on the part of the Cayugas is explainable, in the context of determining whether ejectment is an appropriate remedy, given this prejudice, the delay factor tips decidedly in favor of the defendants.” SPA481.

The court found that the State could be held responsible for all damages as the original tortfeasor, SPA353–62, and conducted a nineteen-day trial in January and

February 2000. The jury found that the fair market value of the land was \$35,000,000 and that the fair rental value for the land, minus a set-off for the State's past payments, totaled \$1,911,672.62 for the period of dispossession. A4758-67. A twenty-three-day bench trial followed in July and August 2000 pertaining to prejudgment interest and, in the resulting decision in October 2001, the court awarded \$211,000,326.80 in interest, for a total of \$247,911,999.42 in damages. SPA68-255. In its analysis, the court issued factual findings that the State lacked good faith in its relevant conduct and that the Cayugas could not be held responsible for any delay in bringing this action. SPA184-229; SPA235-36. The court certified its rulings for appeal under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. 1292(b). SPA1-8.

This Court held oral argument in the consolidated appeals in March 2004. After Sherrill issued, the panel reversed, with one judge dissenting. The majority concluded “[b]ased on Sherrill * * * that the possessory land claim alleged here is the type of claim to which a laches defense can be applied.” Slip op. at 4. The majority reasoned that “what concerned the [Sherrill] Court was the disruptive nature of the claim” at issue there. Id. at 13. Finding that such “disruptiveness is inherent in the [Cayugas’ claim] * * * rather than an element of any particular remedy,” the majority found that the fact that the district court awarded damages in lieu of ejectment was immaterial to the application of laches. Id. at 14-15. That conclusion held true, the majority found, even though ejectment is an action at law and the Supreme Court in Oneida II stated that “application of the equitable defense of laches in an action at law would be novel indeed.” Id. at 15-17 (quoting 470 U.S. at 244 n.6). After finding the defense of laches legally available, the majority concluded that the defense would apply here for the same factual reasons as in Sherrill. Id. at 18. Having applied

laches to a damages remedy meant to substitute for ejectment, the majority found that this conclusion required rejection of the separate award of trespass damages because “the trespass claim * * * is predicated entirely upon plaintiffs’ possessory land claim.” *Id.* at 19. Finally, the majority held that the traditional rule that the United States is not subject to laches “does not seem to be a *per se* rule” and that laches could apply here because the delay was egregious, because no statute of limitations was enacted “until one hundred fifty years after the cause of action accrued,” and because “the United States intervened in this case to vindicate the interest of the [Cayugas], with whom it has a trust relationship,” not to enforce public rights. *Id.* at 20–22.

DISCUSSION

I. THE PANEL MAJORITY’S DECISION WAS IN ERROR.

A. Laches Should Not Apply to the Cayugas’ Requests for Damages.

1. *The effect of Sherrill.* — The Supreme Court’s decision in *Sherrill* does not support the majority’s analysis. *Sherrill* concerned a particular and unique equitable remedy relating to the reassertion of tribal sovereignty over land after a 200-year hiatus and the displacement of local and State authority. 125 S. Ct. at 1489–94. Neither any equitable remedy nor an assertion of tribal sovereignty is at issue here. The district court awarded only damages — the type of relief that the Supreme Court approved in the earlier *Oneida* decisions, which involved a tribal claim for trespass damages regarding property that was the subject of an NIA violation. *Oneida II*, 470 U.S. at 229–30; *Oneida I*, 414 U.S. at 664–65. The *Sherrill* Court explicitly noted: “the question of damages for the [Oneidas’] ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*.” 125 S. Ct. at 1494. The *Sherrill* Court’s discussion of laches was limited to the application of the

defense to the particular equitable remedies at issue, as the dissent here documents in detail. Slip op. at 37–39. Significantly, the Sherrill Court repeated the observation from Oneida II that “application of a nonstatutory time limitation in an action for damages would be ‘novel.’” 125 S. Ct. at 1494 n.14 (quoting 470 U.S. at 244 n.16). The majority emphasized the Sherrill Court’s further statement that “[n]o similar novelty exists when the specific relief [a tribe] seeks would project redress * * * into the present and future.” Slip op. at 16 (quoting 125 S. Ct. at 1494 n.14). As the dissent notes, however, an award of damages does not “project redress into the present and future.” Id. at 39 n.13. Such an award is retrospective and resolves the case with no continuing consequences.

Furthermore, consistent with these explicit acknowledgments that the holding in Sherrill did not apply to damages, the reasons the Supreme Court gave for rejecting the equitable remedies at issue there do not apply to damages. Its analysis of laches depended on questions of sovereignty and governance. 125 S. Ct. at 1490–93. An award of damages does not implicate such issues. In fact, Sherrill expressed approval of the very approach the district court took here. The Sherrill Court repeatedly referred to Oneida Indian Nation v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000), a decision by the same district court judge in the Oneida land claim litigation. 125 S. Ct. at 1487–88, 1489, 1493. In that decision, the district court relied upon its earlier rulings in this case and denied the remedy of ejectment while recognizing that the Oneidas could obtain monetary damages from parties other than private landowners. 199 F.R.D. at 70–95. As the Supreme Court noted, the district court was “transcend[ing] the theoretical” and adopting “a pragmatic approach” to do justice to all parties. 125 S. Ct. at 1488 (quoting 199 F.R.D. at 92). The same is equally true

here. The Sherrill Court also relied (id. at 1491–93) on two cases that specifically recognized that damages would be available even though (indeed, because) recovery of the land would not. Yankton Sioux Tribe v. U.S., 272 U.S. 351, 357–59 (1926); Felix v. Patrick, 145 U.S. 317, 334 (1892). Thus, Sherrill lends no support to the majority’s conclusion that laches may be applied to bar even an award of damages against the State and to leave the United States and the Cayugas with no remedy at all for clear violations of the NIA that rendered the State’s purchases void.

2. Fair market value damages. — As the dissent explains, laches should depend on the remedy sought, not merely the cause of action itself, and on a showing that the plaintiff’s undue delay prejudiced the defendant. Slip op. at 29–31. Nevertheless, with no meaningful analysis of undue delay or prejudice,¹ the majority read Sherrill to make laches applicable to “‘disruptive’ Indian land claims.” Id. at 13–14. It further reasoned that “disruptiveness is inherent in the claim itself — which asks this Court to overturn years of settled land ownership — rather than an element of any particular remedy.” Id. at 15. Even if the Sherrill Court had adopted a “disruptiveness” test for laches, its analysis demonstrates that it was considering the “disruptive remedy” at issue. 125 S. Ct. at 1491 (emphasis added); see id. at 1490 n.9, 1491 n.11. That is, disruptiveness is not inherent in the claim itself.

^{1/} The majority found that the district court “explicitly agreed” that laches would apply. Slip op. at 18. In fact, the court deemed the Cayugas’ delay in seeking ejectment “not completely unreasonable” but concluded: “in the context of determining whether ejectment is an appropriate remedy, * * * the delay factor tips decidedly in [defendants’] favor.” SPA480–81. As the dissent explains, the court never held that laches barred ejectment. Slip op. at 26–27 & n.3. Moreover, its analysis was expressly predicated on the availability of damages. SPA478–79; SPA485. Furthermore, the court later awarded prejudgment interest based on the finding that the Cayugas could not be held responsible for any delay. SPA235–36.

Although an award of actual possession of the land would be disruptive, the award of its fair market value is not. Indeed, far from “overturn[ing] years of settled land ownership,” slip op. at 15, the district court used damages to substitute for ejectment specifically in order to settle and confirm the current possessors’ property rights. As the district court found and the majority did not question, the State’s acquisition of the Reservation violated the NIA and thus the Cayugas’ right to possess the land was never validly extinguished. As the district court further reasoned, absent ejectment, only full compensation through damages could prevent further suits “for a continuing violation of [the Cayugas’] federal right to possession.” SPA350; see U.S. v. Imperial Irrigation Dist., 799 F. Supp. 1052, 1069 (S.D. Cal. 1992).

Furthermore, the conclusion that the Cayugas have no remedy violates the express language of the NIA. It stated at the time of the 1795 and 1807 treaties and continues to state that no purchase of Indian lands made without observance of its requirements “shall be of any validity in law or equity.” SPA638; 25 U.S.C. 177. The application of an equitable defense like laches to bar the Cayugas’ claim (rather than merely particular remedies) effectively gives validity to treaties that violated the NIA, in violation of the NIA’s express terms.² The Supreme Court has already held that this result is untenable. Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) (laches “cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions”); see also Oneida II, 470

^{2/} The idea that inaction by the Cayugas and federal officials could bar the claim entirely similarly cannot be squared with the fundamental tenet that only Congress can extinguish a tribe’s treaty-confirmed interest in land. Oneida II, 470 U.S. at 244 n.16, 248; U.S. v. Santa Fe Pac. Ry., 314 U.S. 339, 347 (1941). Furthermore, the application of the equitable doctrine of laches is inequitable here given the factual findings that the State acted without good faith. SPA184–229.

U.S. at 244 n.16 (“[T]he application of laches would appear to be inconsistent with established federal policy.”); Oneida Indian Nation v. N.Y., 719 F.2d 525, 537–38 (2d Cir. 1983) (allowing NIA violation “to go unremedied” would be “patently inconsistent” with statute). The majority’s result improperly nullifies the NIA.

3. Trespass damages. — Even assuming that damages meant to substitute for the prospective remedy of ejectment could be considered disruptive and thus subject to laches, damages for a past trespass should not be. The majority held otherwise because “the trespass claim, like all of plaintiffs’ claims in this action, is predicated entirely upon plaintiffs’ possessory land claim.” Slip op. at 19. As the dissent explains, however, “the plaintiffs may be able to prove the right to possession” even if they cannot actually regain possession through ejectment. Id. at 32.

B. Laches Cannot Bar the United States from Enforcing a Federal Statute in a Manner Consistent with the Statute of Limitations.

Furthermore, the United States is also a plaintiff in this action and its presence should have prevented the application of laches. The United States was not a party in Sherrill and thus that decision does not address the application of laches to the United States. As a general rule, however, the United States is not subject to laches when acting in its sovereign capacity. U.S. v. Cal., 332 U.S. 19, 39–40 (1947); U.S. v. Summerlin, 310 U.S. 414, 416 (1940); U.S. v. Beebe, 127 U.S. 338, 344 (1888); U.S. v. Milstein, 401 F.3d 53, 63 (2d Cir. 2005); U.S. v. Angell, 292 F.3d 333, 338 (2d Cir. 2002). This general rule applies fully when the United States brings suit to vindicate Indian property interests protected by federal statute or treaty. Nev. v. U.S., 463 U.S. 110, 141 (1983); Board of Comm’rs v. U.S., 308 U.S. 343, 350–51 (1939); see U.S. v. Minn., 270 U.S. 181, 196 (1926).

As the dissent explains, the majority's reasons for departing from this rule do not withstand scrutiny. Slip op. at 33–37. The majority cited no decision holding laches applicable against the United States. It cited a Supreme Court decision to assert that the United States' immunity to laches “does not seem to be a per se rule,” id. at 20, but that decision dealt with the United States in the posture of a commercial actor with no applicable statutory time bar, and even then it was only in dictum that the Court indicated laches might be available. Clearfield Trust v. U.S., 318 U.S. 363, 367, 369–70 (1943). Here, the United States made explicit that it was acting not only on the Cayugas' behalf, as the majority stated, slip op. at 21 & n.8, but also “on its own behalf” as a sovereign enforcing a federal statute. A2583; see Wilson v. Omaha Indian Tribe, 442 U.S. 653, 657 n.1 (1979) (illegal transfer of Indian land violates both “proprietary rights of the Indian” and “governmental rights of the United States” (quoting Heckman v. U.S., 224 U.S. 413, 437–38 (1912))); U.S. v. Boylan, 265 F. 165, 173 (2d Cir. 1920); see also Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 473 (1976); Minn., 270 U.S. at 194–95. Here, as the majority recognized, suit was filed within the time when the United States could file suit under 28 U.S.C. 2415. Slip op. at 21; see id. at 33–34. Even assuming that laches should ever apply against the United States, it could not when the United States acts in its sovereign capacity to enforce a federal statute in a suit filed within the time set by Congress.

II. THIS APPEAL MERITS REHEARING EN BANC.

A. The Panel Majority's Decision Conflicts With Decisions of the Supreme Court and this Court.

1. Laches against the Cayugas. — In Oneida Indian Nation, the Court rejected the argument that an NIA claim was “barred by the nearly 200 years” elapsed since

the challenged treaties. 691 F.2d at 1083. The Court stated: “a suit by the United States as trustee * * * is not subject to state delay-based defenses” and “[i]t would be anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves.” Id. at 1084. For similar reasons, the Court also denied the existence of any “delay-based defense founded on federal law.” Id. Thus, it affirmed the dismissal of defenses based on “time-bars or laches.” Id. at 1097; see Oneida Indian Nation, 719 F.2d at 537–38.

Contrary to the majority’s conclusion, Sherrill did not “effectively overrule[.]” this prior holding regarding laches. Slip op. at 18 n.6. The question of remedies was not before the Oneida Indian Nation Court, as the district court had dismissed for failure to state a claim upon which relief may be granted. 691 F.2d at 1073. Thus, this Court was considering laches as a complete defense to liability. Id. at 1083–84. Sherrill did not call that reasoning into doubt; it addressed the application of laches merely to a particular and unique remedy without indicating that Oneida Indian Nation was incorrect, and in fact expressed approval of the district court’s approach in providing for an award of damages against the State but not dispossession of innocent landowners. 125 S. Ct. at 1489–94; see supra pages 7–8.

The decision also conflicts with holdings of the Supreme Court and this Court that laches is inapplicable in actions at law filed within the statute of limitations. U.S. v. Mack, 295 U.S. 480, 489 (1935); Ivani Contracting Corp. v. City of N.Y., 103 F.3d 257, 259–60 (2d Cir. 1997); U.S. v. RePass, 688 F.2d 154, 158 (2d Cir. 1982); see Oneida Indian Nation, 691 F.2d at 1084, 1097. This action fits squarely within that rule. The majority recognized that ejectment and trespass claims seek legal (rather than equitable) relief but concluded that the normal rule would not apply given “the

unusual considerations at play in this area of the law.” Slip op. at 17. The mere assertion that Indian law is unusual does not justify the majority’s decision to step away from standard laches doctrine, as the dissent explains. *Id.* at 28. To the contrary, the applicability of the established rule is especially clear given the Nation’s commitment to protecting the rights of the Indians — and especially the Cayugas’ rights under the Treaty of Canandaigua — and given that Congress enacted 28 U.S.C. 2415 amidst controversy about Indian land claims and sought to ensure that they would remain viable per its terms. See *Oneida II*, 470 U.S. at 240–44. Indeed, the conclusion that the Cayugas have no remedy due to laches conflicts with the Supreme Court’s holding that laches cannot “give vitality to a void deed and * * * bar the rights of Indian wards in lands subject to statutory restrictions.” *Ewert*, 259 U.S. at 138.

2. Laches against the United States. — Again, both the Supreme Court and this Court have held that laches does not apply against the United States when it acts in a sovereign capacity. See *supra* page 10. The majority held that the United States here was not acting to “enforce a public right or protect the public interest” but rather only “to vindicate the interest of the [Cayugas].” Slip op. at 21 & n.8. Again, both the Supreme Court and this Court have held that the transfer of Indian land in contravention of federal statutes and treaties violates both “proprietary rights of the Indian” and “governmental rights of the United States.” See *supra* page 11.

B. The Proceeding Involves Questions of Exceptional Importance.

The United States respectfully submits that the question whether laches can be applied to bar the United States and the Cayugas’ claims altogether, and thus to foreclose any remedy for clear violations of the NIA even against the wrongdoer, the

State, is of exceptional importance and should be decided by the full Court. In addition to being hotly contested and highly publicized, the land claim cases are highly significant in terms of the acreage of land and potential damages at stake.³ Indeed, the effort that has gone into the land claim cases since Oneida I demonstrates the importance of the questions at issue. This case alone has been litigated for twenty-five years, at a tremendous cost, and this is only one case. In the thirty-one years between Oneida I and this decision, this Court has issued ten published decisions in land claim cases⁴ and the district courts many more. The apparent import of the majority's analysis is that all of these cases were doomed from inception despite the Supreme Court's affirmance of a damages award in Oneida II and approval in Sherrill of the district court's approach to these cases.⁵

^{3/} If left intact, the decision appears likely to end all the Indian land claim cases currently pending in this Court and associated settlement efforts. Oneida Indian Nation v. County of Oneida, No. 74-CV-187 (N.D.N.Y.); Stockbridge-Munsee Cmty. v. N.Y., No. 86-CV-1140 (N.D.N.Y.); St. Regis Mohawk Tribe v. N.Y., 89-CV-829 (N.D.N.Y.); Seneca Nation v. N.Y., No. 93-CV-0688A (W.D.N.Y.); Onondaga Nation v. N.Y., No. 05-CV-314 (N.D.N.Y.). Like this case, those cases involve possessory claims invoking the NIA and the general factual considerations that led the majority to apply laches.

^{4/} W. Mohegan Tribe & Nation v. Orange County, 395 F.3d 18 (2d Cir. 2004); Seneca Nation v. N.Y., 382 F.3d 245 (2d Cir. 2004); Seneca Nation v. N.Y., 178 F.3d 95 (2d Cir. 1999); Golden Hill Paugussett Tribe v. Weicker, 39 F.3d 51 (2d Cir. 1994); Oneida Indian Nation v. N.Y., 860 F.2d 1145 (2d Cir. 1988); Oneida Indian Nation v. N.Y., 732 F.2d 261 (2d Cir. 1984); Oneida Indian Nation v. County of Oneida, 719 F.2d 525 (2d Cir. 1983); Oneida Indian Nation v. N.Y., 691 F.2d 1070 (2d Cir. 1982); Mohegan Tribe v. Conn., 638 F.2d 612 (2d Cir. 1980); Oneida Indian Nation v. County of Oneida, 622 F.2d 624 (2d Cir. 1980); see also N.Y. v. White, 528 F.2d 336 (2d Cir. 1975).

^{5/} Furthermore, the majority's analysis arguably might apply even in suits to
(continued...)

Furthermore, the holding that the United States is subject to laches here is singular and potentially groundbreaking. The decision supports the application of laches even when the United States is acting in a sovereign capacity and even when suit is filed within the applicable statute of limitations. The majority's open-ended analysis could be applied in a variety of substantive contexts.

Moreover, the question whether the Cayugas and similarly situated tribes deserve some remedy for the loss of their land is exceptionally important in that it implicates the question of whether our Nation will honor its promises — even its ancient ones. The NIA was enacted to protect tribes against just the sort of unfair, bad faith dealing by which the State acquired the Cayuga Reservation. President Washington made the promise explicit: “Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the [United States]. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.” A10751. The majority's holding unfairly bars the Cayugas and even the United States from enforcing this promise and its statutory embodiment. That holding merits en banc review.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant this petition, vacate the panel's decision, and affirm the judgment below for the reasons in the United States' briefs.

^{5/}(...continued)

enforce other sorts of Indian treaty rights. See, e.g., Minn. v. Mille Lacs Band, 526 U.S. 172 (1999) (hunting and fishing rights under nineteenth-century treaty).

