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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF SHERRILL, NEW YORK, :
Petitioner, :
v. : No. 03-855
ONEIDA INDIAN NATION OF NEW :
YORK, ET AL. :
- - - - - x

Washington, D.C.

Tuesday, January 11, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:05 a.m.

APPEARANCES:

IRA S. SACKS, ESQ., New York, New York; on behalf of
Petitioner.

CAITLIN J. HALLIGAN, ESQ., Solicitor General, New York,
New York; for New York, as amicus curiae, supporting
Petitioner.

MICHAEL R. SMITH, ESQ., Washington, D.C.; on behalf of
Respondents.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; for
United States, as amicus curiae, supporting
Respondents.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF IRA S. SACKS, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF CAITLIN J. HALLIGAN, ESQ. For New York, as amicus curiae, Supporting Petitioner	18
ORAL ARGUMENT OF MICHAEL R. SMITH, ESQ. On behalf of the Respondents	26
ORAL ARGUMENT OF MALCOLM L. STEWART, ESQ. For United States, as amicus curiae, Supporting Respondents	43

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P R O C E E D I N G S

[10:05 a.m.]

JUSTICE STEVENS: We will now hear argument in case of City of Sherrill, New York against the Oneida Indian Nation of New York.

Mr. Sacks, whenever you're ready.

ORAL ARGUMENT OF IRA S. SACKS

ON BEHALF OF PETITIONER

MR. SACKS: Justice Stevens, and may it please the Court:

With the Court's permission, the state of New York, as amicus, will address issues related to the Treaty of Buffalo Creek and I will address the other reasons why aboriginal title and other Indian possessory rights to the properties at issue were extinguished long before the Oneida Indian Nation purchased the properties in 1997 and 1998.

The asserted basis for tax immunity in this case appears at page 1 of respondent's brief which is that the Oneidas have at all times held a tribal possessory right in the properties. But even if there was a tribal possessory right, aboriginal title or under the Treaty of Canandaigua, in 1805 and 1807 when these properties passed out of tribal hands, the passage of 190 years has extinguished that right. For 190 years, these properties

1 have been in private non-Indian hands, have been freely
2 alienable, have been transferred to numerable purchasers
3 and have been subject to a full panoply of state and local
4 laws including taxation.

5 JUSTICE KENNEDY: Well, is it your position that
6 whenever an Indian transfers land in violation of the
7 Nonintercourse Act, that that's a valid transfer? And if
8 not, why is this different?

9 MR. SACKS: No. It is not our position that
10 that would be a valid transfer if there was a violation of
11 the Nonintercourse Act. The principal issue here is
12 whether, after of the passage of 190 years, there remains
13 a possessory right. If there was a violation of a
14 Nonintercourse Act in 1805 and 1807, Justice Kennedy, we
15 believe the Oneida Indian nation has a -- under this
16 Court's decision has a federal common law damage suit
17 against New York state or against the United States of
18 America for failing to exercise its fiduciary duty. But
19 after 190 years, in 1997, they did not have a possessory
20 right to these properties.

21 The possessory right we're talking about,
22 aboriginal title or some other tribal possessory right,
23 isn't just the concept. As this Court has defined
24 aboriginal title of those possessory rights, it's a right
25 to current possession. And under this Court's decisions

1 in cases such as Felix versus Patrick and Yankton Sioux
2 and Williams and Mitchell and Santa Fe, all of which were
3 cited in the dissent written by Justice Stevens, though
4 there was a dissent in Oneida II, tribal possessory rights
5 are barred by that passage of time, the change in the
6 character of the land and the innumerable innocent
7 purchasers .

8 JUSTICE BREYER: Why does not having a
9 possessory right mean that the city could tax them or the
10 state?

11 MR. SACKS: The basis for the tax immunity here
12 is that this land does not have Indian country status.
13 For this land to have Indian country status, it has to be,
14 in our view, under this Court, the Venetie decision.
15 Federal set-asides and federal superintendents.

16 If you look at how the Oneida Indian nation got
17 this land in 1997, it wasn't because of any set-aside by
18 the Federal Government in 1794 even if there was and I
19 will get you that later.

20 JUSTICE BREYER: No, I'm just thinking, suppose
21 you have a reservation but the tribe doesn't have a
22 possessory right because in the middle of the reservation,
23 there is some kind of long-term lease or sale to a house
24 that's owned by somebody else who is not a member of the
25 tribe. I would think -- am I right that the city or the

1 county in which that reservation sits can't tax it anyway?

2 MR. SACKS: I absolutely agree with you.

3 JUSTICE KENNEDY: All right. So if you were to
4 say the tribe does not have a possessory right, they can't
5 go and eject all the people who are living there and built
6 houses over the last 192 years. That doesn't mean still
7 that you could tax them.

8 MR. SACKS: But your hypothetical, Your Honor,
9 presupposed the existence of the reservation and
10 presupposed a possessory right subject to lease. The
11 possessory right here did not exist because the Oneida
12 Indian nation had no rights with respect to the land at
13 all in 1997. Those rights could not be enforced. The
14 right not to be --

15 JUSTICE KENNEDY: It couldn't be enforced
16 against certain innocent purchases but when the land is
17 reacquired, then it seems to me we have to ask whether
18 there was an extinction of aboriginal title and whether
19 the reservation was at some point subsequently
20 disestablished by federal act. If we hold against you on
21 the ground that there was no extinction of aboriginal
22 title and there was no disestablishment of the
23 reservation, then it seems to me that when they reacquire,
24 we get to exactly the point that Justice Breyer raised and
25 that is, once they reacquire the land, why does it become

1 taxable? Why does its nontaxable status not simply
2 reassert itself?

3 MR. SACKS: I think that you have to look at the
4 definition of Indian country. If you look at the
5 definition of Indian country, it requires, with respect to
6 the properties we're talking about, federal set-asides and
7 federal superintendents.

8 JUSTICE KENNEDY: So you're saying if the
9 original establishment of the reservation was simply a
10 continuation, was literally a reservation from a transfer
11 of land to the state of New York and that the Indian title
12 was a purely aboriginal title, not a title conferred by a
13 federal act creating reservations but it cannot be Indian
14 country, is that correct?

15 MR. SACKS: If I understand the question that
16 you asked, Your Honor, if the title came from the state of
17 New York, for example --

18 JUSTICE KENNEDY: Let's assume the title is
19 aboriginal. Nothing in an act of the United States says
20 we're giving you this land to the Indians, e.g., in the
21 Kansas situation. It's simply aboriginal title and it was
22 never extinguished.

23 Are you saying that if that is the source of the
24 title as opposed to a federal act saying we give this to
25 you, that it cannot be Indian country?

1 MR. SACKS: No, Your Honor. In a situation
2 where there was continuing aboriginal title, similar to
3 the Senecas in the state of New York where New York did
4 not terminate the aboriginal rights of the Senecas, there
5 need not be congressional act, there need not be
6 congressional or treaty action to establish the
7 reservation.

8 JUSTICE KENNEDY: So this part of your argument
9 depends on our accepting your position of the treaty of
10 Fort Schuyler as being a conveyance of all property and a
11 later retrocession, is that correct? Because otherwise, I
12 don't see what extinguished the aboriginal title.

13 MR. SACKS: What extinguished the aboriginal
14 title with respect to this aspect of the argument, and
15 then I will move on to the treaty of Fort Schuyler and the
16 treaty of Canandaigua. What extinguished the aboriginal
17 title is the passage of time, the fact that this land has
18 been under state and local jurisdiction for 190 years and
19 this Court observed, in Hagen and Rosebud Sioux, I
20 acknowledge it was in a different context but this is
21 important, that state and local jurisdiction sovereignty
22 are important in situations like this where what we're
23 dealing with is very few -- 1 percent of the land in the
24 City of Sherrill is owned by the tribe.

25 The land is predominantly non-Indian. And as

1 this Court observed in Hagen and Rosebud Sioux, a finding
2 of the land now comes back into tribal jurisdiction, to
3 paraphrase, seriously disrupts the justifiable
4 expectations of the community and that's not just a
5 hypothetical in this case.

6 JUSTICE BREYER: I know that but I mean it seems
7 to me one thing that Oneida establishes is that the whole
8 title doesn't just disappear if nothing else happens
9 simply because of the passage of time.

10 MR. SACKS: I think what this appears, Your
11 Honor, is the right to possess.

12 JUSTICE KENNEDY: And we agree with that or I
13 hypothetically agree with that. They can't come in and
14 eject people. But then I'm back to my first question
15 because I take it that the refusal in Oneida to the
16 suggestion that they can't go, say, to Buffalo, New York
17 or wherever or some town and throw everybody out of the
18 house, that that, of course, does reflect the passage of
19 time. But for a city or state to tax the land, that
20 doesn't involve the same kind of interference with
21 people's expectations of living in the houses that they
22 bought, that throwing someone out of his house would
23 involve.

24 MR. SACKS: What impacts the expectations is the
25 following. I'll give you an example that appears from the

1 joint appendix on the Court of Appeals on pages 1263 to
2 1277.

3 In the year 2000, the city of Oneida decided two
4 Oneida nation businesses, a convenience store and a gas
5 station, for 16 fire code violations. The tribe citing
6 this Court's decision in Brendale said, we're not governed
7 by the local fire code. We're governed by tribal
8 jurisdiction. It's more than just the interference, the
9 issue of taxation, the issue of sovereignty is whether a
10 gas station is going to blow up or burn down.

11 JUSTICE O'CONNOR: It is a matter, is it not, of
12 whether the tribe now has sovereignty over this parcel of
13 land, is that's what's at the bottom of the question?

14 MR. SACKS: I think in terms of the problems for
15 the citizens of the City of Sherrill, taxation is part of
16 it, and sovereignty is part of it, they go hand in hand.

17 JUSTICE O'CONNOR: If the tribe has sovereignty
18 status with regard to this property, then presumably this
19 city can't tax it. So we have to decide that, do we?

20 MR. SACKS: Yes, you do, Your Honor.

21 JUSTICE O'CONNOR: What do we do with the Oneida
22 II case decided in 1985?

23 MR. SACKS: The position we're taking here is
24 fully consistent with Oneida II. In Oneida II, this Court
25 held that there was a violation of federal common law

1 principally because of a violation of the Nonintercourse
2 Indian Trade Intercourse Act in 1795. This Court wasn't
3 asked to deal with, at that time, with the Treaty of Fort
4 Schuyler. It wasn't asked to deal with the treaty of
5 Buffalo Creek. It wasn't presented with evidence of the
6 numerous authorized New York state treatise from 1840
7 through 1846 that the ministries reservation of the state
8 of New York will deal with --

9 JUSTICE SCALIA: Why not? Why not? Why not? I
10 mean, is every decision we make up for review when the
11 interested parties fail to cite what they now assert are
12 the dispositive acts?

13 MR. SACKS: No, Your Honor. I think that
14 principle of stare decisis still govern`and I think why
15 this is consistent with the position that we have taken
16 with respect to the passage of time extinguishing the
17 possessory right is what this Court for stare decisis
18 purposes found in Oneida II was that there was a violation
19 of federal common law with respect to a transfer that was
20 very different than this transfer. Without any
21 examination of the Treaty of Buffalo Creek or without any
22 examination of the Treaty of Fort Schuyler.

23 JUSTICE SCALIA: But that wouldn't have been a
24 violation of federal law if this were not Indian country,
25 if this were not an Oneida reservation when the transfer

1 occurred.

2 MR. SACKS: Your Honor, that might or might not
3 be correct, depending on how one used the scope of the
4 Nonintercourse Act. But if one views the scope of the
5 Nonintercourse Act to apply to Indian reservations, even
6 state reservations, as the Second Circuit in Mohican Tribe
7 has held, then the treaty of Fort Schuyler could have
8 terminated all aboriginal title. The treaty of Fort
9 Schuyler could have established a state reservation for
10 the Oneidas, and the Nonintercourse Act of 1790, two years
11 later, could have prohibited the sale of those lands even
12 though it was a state reservation and under state
13 jurisdiction.

14 JUSTICE SCALIA: Is that the application of the
15 Nonintercourse Act? Because I assume it was only the
16 federal act reservation.

17 MR. SACKS: Well, this Court has not dealt with
18 that issue and for our purposes.

19 JUSTICE SCALIA: How does it read? What does it
20 say? I didn't mean to interrupt you.

21 MR. SACKS: The Nonintercourse Act in effect at
22 the time prohibited the purchase of lands from Indians or
23 Indian tribes, to paraphrase. And what hasn't --

24 JUSTICE O'CONNOR: Unless made by treaty or
25 convention entered into pursuant to the constitution.

1 MR. SACKS: Yes, unless subject to federal
2 approval.

3 JUSTICE GINSBURG: And the idea of precisely
4 what's at stake within the Oneida litigation, as I
5 understand it, the counties and the municipalities in the
6 City of Sherrill would not be left in the end having to
7 pay, New York would.

8 MR. SACKS: The City of Sherrill is not a party
9 in the land claim litigation. The land claim litigation
10 --

11 JUSTICE GINSBURG: From the county's point of
12 view, I'm asking who pays at the end of the month and it
13 seems, in the Oneida case, it's the state. Is it
14 different here? And what taxes are we talking about
15 precisely?

16 MR. SACKS: What we are talking about -- to
17 answer the first portion of your question, Justice
18 Ginsburg, I think ultimately the citizens of the state of
19 New York would pay but the judgement would be against
20 either the state of New York or the against the counties
21 in the land plat.

22 JUSTICE SCALIA: What goes with the taxes? You
23 said that the other effect would be that whenever the
24 Oneidas buy a piece of property that is within this former
25 reservation and of which only 1 percent is now owned by

1 Indians, whenever they buy a piece of property, that
2 property is taken off the tax rolls.

3 MR. SACKS: Correct, Your Honor.

4 JUSTICE KENNEDY: Which, of course, makes it a
5 lot easier for them to buy it because it's much less
6 expensive for them to hold that land. What else happens?
7 The town can't regulate it.

8 MR. SACKS: The town can't regulate it and if
9 they are running a business on it, we believe this is
10 contrary to state law, they are running a business out
11 there, they are not collecting sales taxes.

12 JUSTICE KENNEDY: And I assume that also means
13 that that land cannot be repurchased by non-Indians?

14 MR. SACKS: The tribe has changed its position
15 on that, I believe, in the course of the last 30 years but
16 that is their current position. That it becomes subject
17 to the Nonintercourse Act consistent with their position.

18 With the Court's permission, I want to turn to
19 the 1788 Treaty of Fort Schuyler and the complementing the
20 1794 Treaty of Canandiagua. Our position on the treaty of
21 Fort Schuyler I think is very plain in our papers and I
22 just want to highlight what's in the rest of the treaty
23 after Article 1, which is a cessionable land. But in the
24 rest of the treaty is that New York reserved numerous
25 rights even with respect to the reservation's land. New

1 York had, among other things, the right to make and apply
2 laws to the reservation, to enforce the treaty -- and I'm
3 quoting from Article 4 -- in such manner as the state
4 shall deem proper.

5 New York had the right to enforce its criminal
6 laws with respect to intruders on the reservation that New
7 York granted to the Oneidas obtaining the assistance of
8 the Oneidas to do so. New York, in the treaty, prohibited
9 the Oneidas from selling lands. New York, in the treaty,
10 prohibited the Oneidas from certain length of leases and
11 New York had the right to enact laws with respect to the
12 leases that were permitted to enforce the leases.

13 The other thing that one needs to look at in the
14 context of the times, we're looking at how would the
15 Oneidas have understood this. The tribes of the Iroquois
16 Confederacy, knew how to preserve their aboriginal title
17 when they wanted to do so and the Oneidas didn't do that.
18 In the 1797 Big Tree agreement with the Senecas which is
19 published at 7 Statutes at large, 601, the Senecas sold
20 much of their lands throughout the marsh under the
21 approval of the United States.

22 In the agreement, the agreement provided that
23 the reserved lands were, and I quote, clearly and fully
24 understood to remain the property of the Senecas in as
25 full and ample matter as if these presence had not been

1 executed. That is the way an Indian tribe understood
2 preserving aboriginal title. That didn't happen in the
3 Treaty of Fort Schuyler.

4 JUSTICE SCALIA: You're a good lawyer that they
5 hired and the Oneidas may not have hired as good a lawyer.
6 I don't think this was done around the campfire, do you?

7 MR. SACKS: I'm sure it was not, Your Honor.

8 The other thing that one has to look at at times
9 is what New York state was doing. New York state entered
10 into three similar treatise at the time. One with the
11 Oneidas, one with the Cayuga and one with the Onondaga.
12 Those three treaties all terminated aboriginal title in
13 the first provision. The other three tribes of the were
14 not of concern.

15 JUSTICE SOUTER: When you say terminated the
16 title, you mean by the conveyance of all lands?

17 MR. SACKS: Yes, they had the exact same
18 language in Article 1. The structure of the treaties were
19 identical.

20 The other three tribes of the Iroquois were not
21 of concern to New York state in 1788 because the Mohawks
22 had mostly moved to Canada, the Tuscaroras had no land of
23 their own and the Senecas were in the portion of New York
24 state where Massachusetts had the preemption right. So if
25 you look at what is happening back in 1788 and early 1789,

1 New York state is setting up a state treaty with the
2 Oneidas and keeping jurisdiction over those lands.

3 Now, to go back to what you asked earlier, there
4 is no question that if in that context, the Federal
5 Government then passed a statute that says, as it may, the
6 Oneidas can't sell this land without federal approval.
7 That's a violation of the Nonintercourse Act but it
8 doesn't change the fundamental nature of the land as being
9 under state jurisdiction and has been under state
10 jurisdiction since 1788.

11 JUSTICE GINSBURG: Was there ever any federal
12 superintendent of the land?

13 MR. SACKS: If you count an agent going on the
14 land, there was an agent going on the land, but what
15 happened with this land in terms of federal
16 superintendents is that this land has been superintended,
17 and supervised whether in tribal hands or otherwise by the
18 state of New York and local governments since 1788.

19 There is a reference in our papers to a report,
20 what was issued in connection with the New York state
21 setting up their troopers to cover the reservations and
22 that reported knowledge that the United States Government
23 appreciated the fact that the state of New York had been
24 keeping peace on the reservations with their police and so
25 no reason to interfere with 100 years -- and this was in

1 the 20th century -- of over 100 years of state police
2 supervision.

3 JUSTICE SCALIA: Isn't the FBI that keeps peace
4 on other reservations. Isn't it quite standard for state
5 law enforcement to function?

6 MR. SACKS: Yes, Your Honor. If the FBI doesn't
7 do it, states often do it. They do it sometimes with the
8 permission but this happened for 200 years.

9 JUSTICE STEVENS: Thank you, Mr. Sacks.

10 Ms. Halligan?

11 ORAL ARGUMENT OF CAITLIN J. HALLIGAN

12 FOR NEW YORK, AS AMICUS CURIAE,

13 SUPPORTING PETITIONER

14 MS. HALLIGAN: Justice Stevens, may it please
15 the Court:

16 The state of New York was granted time to
17 address the third question regarding the 1838 treaty which
18 we believe requires reversal of the decision below because
19 it disestablish the Oneida reservation. Respondents claim
20 that there is not exercised sovereignty over any part of
21 land they buy within a vast 300,000 tract in Central new
22 York.

23 This has long been inhabited --

24 JUSTICE O'CONNOR: Is sovereignty something that
25 the tribes can lose by inaction over a period of time?

1 MS. HALLIGAN: I believe that it is, Your Honor,
2 for the reasons that are laid out in petitioner's brief
3 but regardless of what the Court decides about that
4 question, the Treaty of 1838 clearly disestablishes the
5 reservation which terminates all sovereignty
6 prospectively. The language in the historical context --
7 yes, Your Honor. Yes, the Treaty of Buffalo Creek. It
8 makes clear both the language of the treaty itself as well
9 as its historical context that it was intended to
10 terminate into the sovereignty of New York state.

11 JUSTICE O'CONNOR: What you seem to be asking is
12 to infer from that treaty that the prior unlawful land
13 sales of the Oneida's New York reservations were somehow
14 ratified.

15 MS. HALLIGAN: No, Your Honor, ratification is
16 not presented squarely in this case. The only question
17 that's at issue in this case is whether or not, regardless
18 of whether the transactions that took place between 1795
19 and 1838 were legal or illegal, and we've argued they're
20 legal in other cases --

21 JUSTICE O'CONNOR: But if you're right about
22 Buffalo Creek, it would mean that the effect of the
23 government's decision to repossess something in Kansas was
24 to leave the Oneidas without any land.

25 MS. HALLIGAN: Well, at that point --

1 JUSTICE O'CONNOR: It certainly wasn't that
2 clear from it. It appeared to be the assumption that the
3 Oneidas did not have to go to Kansas, if they chose not to
4 do it. It was dependent on making suitable arrangements.

5 MS. HALLIGAN: With regard to the 5,000 acres
6 that they occupied as of 1838, one could read Ransom
7 Gillet's assurances to the Oneidas as allowing them to
8 continue to retain occupancy over that narrow place of
9 land but what that cannot do is change the language of the
10 treaty which makes clear that the reservation is otherwise
11 entirely disestablished. And if I can refer to some of
12 the language of the treaty itself, first of all, the
13 treaty explicitly states that its purpose was to carry out
14 the governor's policy in removing the Indians from the
15 east to the west of the Mississippi. That simply cannot
16 be squared with ongoing sovereignty over the remaining
17 290,000 acres which they now claim.

18 JUSTICE SCALIA: Sure it can. One way to pursue
19 that policy is to offer them lands in the west if they
20 want to go there. That would certainly pursue the
21 government's policy of removing them.

22 MS. HALLIGAN: This Court held that Article 13
23 of the treaty which provides that the Oneidas agreed to
24 remove was sufficient to effect the present grant of the
25 Kansas land and to avoid any forfeiture. So it was much

1 more than an agreement to agree or an offer, if you will.

2 JUSTICE SCALIA: So you're saying there is no
3 consideration if they simply agree to remove if they want
4 to remove. If they chose to ignore it, they want to
5 ignore it.

6 MS. HALLIGAN: No, they did receive
7 consideration and the Court made sure --

8 JUSTICE SCALIA: They gave none, I'm talking
9 about.

10 MS. HALLIGAN: Who gave none, Your Honor?

11 JUSTICE SCALIA: The Indians. You're saying
12 they gave no promise in exchange, if they simply promised
13 to remove if they felt like it.

14 MS. HALLIGAN: No, Your Honor.

15 JUSTICE SCALIA: I'm trying to help you here.

16 MS. HALLIGAN: Then in that case, I suppose I
17 should agree. My apologies. But what they did was to
18 agree to remove and in fact, that's what happened. If you
19 look at what transpired immediately following the treaty,
20 by 1846, all but 350 acres, down from 5,000, have been
21 sold by the Oneidas and very few remain.

22 By 1920, there are only 32 acres. And the
23 U.S.'s activities in the area also confirm that that was
24 the understanding of the treaty, that it terminated
25 sovereignty. There have been very sparse references in

1 the records to some exercise of jurisdiction by the U.S.
2 starting around the turn of the century, around the early
3 1900s, but those only relate to the 32 acres that remain
4 occupied by the Oneidas. There is no indication of any
5 exercise of U.S. jurisdiction over the remaining 295,000
6 acres.

7 JUSTICE BREYER: I thought that perhaps the
8 Treaty of Buffalo Creek is thinking of 50,000 acres where
9 these particular Indian tribe members have their homes or
10 at least arguably. Just no one was thinking about the
11 remaining 300,000 because they had long left those. It
12 had nothing to do with them.

13 MS. HALLIGAN: I believe the text and the
14 historical background suggests otherwise, Your Honor.
15 Article 4 of the treaty says that the Kansas lands will be
16 the new homes of the Oneidas and it also explains where
17 the Oneidas can exercise sovereignty. It says that it
18 will secure to the Oneidas in the Kansas land in said
19 country, which refers to the Kansas land, the right to
20 establish their own form of government, to appoint their
21 own offices and to administer their own laws. That means
22 that sovereignty is to be in Kansas, not to be in New
23 York.

24 JUSTICE SOUTER: Well, It means that that's what
25 was intended but what do you make of all of the testimony

1 about the representations made by -- I forget the man's
2 name, the government's representative, to the effect you
3 don't have to leave.

4 MS. HALLIGAN: That related only to the 5,000
5 acres that they occupied at that time. But let's make
6 very clear about he made that assurance.

7 JUSTICE SOUTER: I guess I just want to get to
8 the point. Doesn't that negate your argument that the
9 treaty as such disestablished the reservation?

10 MS. HALLIGAN: No, Your Honor, it doesn't. The
11 treaty on its terms appears to disestablish the
12 reservation entirely. Direct statements could perhaps be
13 read as subsequent blocks on that treaty to assure the
14 Indians that they won't be forced off their land, the
15 5,000 acres that they continue to occupy, perhaps because
16 New York was not a party to the treaty, it couldn't be any
17 explicit session language in the treaty.

18 New York was the only entity that had the right
19 to buy that remaining 5,000 acres because it held the
20 right of preemption. So it may be that the Oneidas wanted
21 to be sure that they could reach reasonable terms. And
22 they did. They sold all that land within the following
23 six years after consummation of the treaty. So the
24 contemporaneous history squares with that.

25 It's very similar to what happened in Santa Fe

1 in which this Court said there was a reservation that was
2 treated for the Santa Fes. There was some indication of
3 acceptance of that reservation and that acceptance was
4 decision to terminate the tribe's sovereignty over any
5 land outside of the reservation that was provided to them,
6 even though many of them did not in fact remove to that
7 land.

8 Here the Oneidas received much more. Not only
9 did many of them sell the lands and leave immediately but
10 they received the benefit of their bargain by recovering
11 compensation for the Kansas land from this Court and the
12 New York Indians.

13 JUSTICE BREYER: What is the precise language
14 that you think relinquished changed the` sovereignty?

15 MS. HALLIGAN: I think there are several
16 provisions, Your Honor.

17 First of all, in the recital, it states that the
18 purpose of the treaty is to carry out the government's
19 policy in removing the Indians from the east to the west
20 of the Mississippi.

21 Article 2 also notes that the Kansas lands will
22 be a permanent home for all Indians now residing in the
23 state of New York as well as elsewhere and Article 4
24 states that there will be an exercise of sovereignty. It
25 says specifically that will they will be able to establish

1 their own form of government, appoint their officers and
2 administer their laws in the Kansas land specifically. So
3 I think those are the strongest provisions.

4 I would also like to touch for a moment if I can
5 on the question that several members of the Court have
6 raised which is what is the impact of this decision here.
7 From the perspective of the state of New York and the
8 localities, it's very serious because it does concern
9 whether or not the tribe can unilaterally regain
10 sovereignty over a very large tract of land in central New
11 York. This is an area that has been --

12 JUSTICE GINSBURG: There are implications from
13 Oneida to case that the Indians can reacquire land and
14 assert some kind of possessory right.

15 MS. HALLIGAN: With regard to a narrower parcel
16 of land than what's at issue here. And in any event, the
17 Court expressly did not pronounce on the effect of the
18 Buffalo Creek treaty here.

19 If that's the case, what could well result is a
20 patchwork quilt of jurisdiction which this Court has said
21 poses tremendous governance problems. It's governance by
22 tract book. This is not just hypothetical. There are
23 already difficulties that have started to arise as a
24 result of the Second Circuit's decision.

25 For example, another tribe relying on the

1 decision here purchased land within its original land
2 claim area that's just 300 yards from a local high school
3 and have begun operation of a gaming hall there. The
4 locality attempted to enjoin operation of the gaming hall,
5 but wasn't able to do so in light of the Second Circuit's
6 decision below.

7 We anticipate there are will be many other
8 problems of that sort that will arise. The residents of
9 the area here have long settled justifiable expectations.
10 The settlement patterns are clear here. The absence of
11 any exercise of U.S. jurisdiction outside a very small
12 plot of land is not controverted. These are factors that
13 this Court has repeatedly held in cases like Hagen and
14 Yankton Sioux are relevant to the question of both what
15 the contemporaneous understanding of the treaty was and
16 what the result should be today and we submit that they
17 should lead to the same result here as well.

18 If there are no further questions --

19 JUSTICE STEVENS: Thank you, Ms. Halligan.

20 Mr. Smith, we'll hear from you, please.

21 ORAL ARGUMENT OF MICHAEL R. SMITH

22 ON BEHALF OF RESPONDENTS

23 MR. SMITH: Justice Stevens, may it please the
24 Court:

25 There was a suggestion in answer to an earlier

1 question that the Oneidas have changed their position
2 about whether the land is alienable when in their hands.
3 That's not correct. There is nothing in the record to
4 suggest that.

5 What the record does suggest at page 213 of the
6 joint appendix is that Sherrill has changed its position.
7 It want an easement on Oneida land in 1997 and at that
8 page of the appendix, you will see that Sherrill went to
9 the Department of the Interior for federal approval of the
10 easement under federal law, understanding at the time the
11 Oneida's position and the federal law principle that the
12 land wasn't subject even to an easement absent the
13 secretary's approval.

14 JUSTICE SCALIA: So you're saying your position
15 was and is that it's not inalienable without the approval
16 of Defense?

17 MR. SMITH: Yes. And Oneida's actual possession
18 of the land, actual possession is unified with their
19 underlying federal and property and treaty rights, the
20 land is inalienable and cannot be sold today out of the
21 Oneida's position any more than it could 200 years ago.

22 JUSTICE SCALIA: But the portion within the
23 reservation you claim is alienable so long as it's not
24 owned by an Oneida. Current owners can sell it to
25 somebody else, right?

1 MR. SMITH: Your Honor, the point of Oneida II
2 -- the answer is yes.

3 JUSTICE STEVENS: Like it was strange?

4 MR. SMITH: No, Your Honor. There is an unusual
5 twist to it. It arises from the fact that there were
6 illegal transfers 200 years ago. There was a suggestion
7 in the Oneida II decision and it has been followed by the
8 lower federal courts that there may be equitable
9 principles that constrain remedies and a course of order
10 to be entered in a land claim action brought by a tribe
11 that is out of possession but the equitable principles
12 that are at stake here are very different and they don't
13 involve the same --

14 JUSTICE O'CONNOR: Well, if you prevail in this
15 case, then could suits be brought by the tribe to evict
16 current owners of land on this historical Oneida
17 300,000-acre reservation?

18 MR. SMITH: No, Justice O'Connor. The Courts
19 have ruled that we may not do that and it is the position
20 and I will state it clearly here today that the Oneidas do
21 not assert a right to evict landowners in the land claim
22 area.

23 JUSTICE O'CONNOR: But if it's owned by the
24 state of New York, if it's been acquired somehow by the
25 state, then what?

1 MR. SMITH: We are not asserting a right to
2 evict. We are not waiving any of the underlying rights
3 that involve right to possession under federal law and
4 aboriginal rights and the point I'm making should not be
5 construed that way.

6 What I'm saying is that we are not asking the
7 Court and do not expect the Court to evict anyone from
8 land that is not in our actual possession.

9 JUSTICE BREYER: What happens about -- suppose
10 -- I just want to follow this. Suppose you don't evict
11 the people who are there but it's 22 square miles in the
12 center of New York state. That's a lot of land. And
13 maybe that's worth a trillion dollars, I don't know. So
14 does that mean that the Indian tribe would have -- would
15 it mean that it would have the right to, let's say,
16 hundreds of billions of dollars, the value of that
17 property and it could sue someone for it, the state of New
18 York or the Federal Government? I guess the state of New
19 York?

20 MR. SMITH: Let me give you a concrete answer.
21 The key to the land claim is approximately one quarter of
22 the Oneida land claim and it has gone to judgement and is
23 on appeal in the Second Circuit. The judgement in that
24 case after justice and interest and so on was \$250 million
25 and it was rendered against the state of New York only as

1 the initial and --

2 JUSTICE BREYER: What was the acreage there?

3 MR. SMITH: Approximately one fourth -- the
4 answer is 64,000 acres.

5 JUSTICE BREYER That may not be worth as much.
6 Maybe this includes several cities and towns? What do you
7 think it is? In other words, the answer to my question is
8 in principle, yes. In principle, if the Indian tribes own
9 22 square miles, even if they can't get possession,
10 they're entitled to the value of it, in your opinion?

11 MR. SMITH: Correct. The point of
12 Oneida II is that it damages remedy as appropriate to a
13 tribe out of possession but there is no suggestion that
14 that is a judicial sale of the underlying Federal
15 Governmently protected --

16 JUSTICE BREYER No, no, of course the people who
17 are there have it, maybe it's not Buffalo. I don't know,
18 maybe it's all of Buffalo, New York, or maybe it's a town.
19 I'm not saying that that's the law but I just wanted your
20 view of that. And then I wanted to know this. On the
21 legal part, I would like your response to the -- I take it
22 your answer is yes, they're entitled to the value of it,
23 which I'm right about that, that is your answer?

24 MR. SMITH: Yes, Your Honor. Well, they're
25 entitled to two items of value. They're entitled to

1 retrospective damages for trespass and in that the Court
2 has not --

3 JUSTICE O'CONNOR: On the whole 300,000?

4 MR. SMITH: Well, there is one plus part of it
5 that we have not sued upon because there was a 1798
6 federal treaty that validated the transfer. The state,
7 which feels that it was not bound by the Nonintercourse
8 Act, twice went to the Federal Government for formal
9 federal treaty approval of these transactions.

10 One of them went through. That was 1798. The
11 other one was 1802. The President did not proclaim it and
12 the state never went back to the Federal Government.

13 JUSTICE SOUTER: Do the Oneidas have a claim to
14 tax the current property owners?

15 MR. SMITH: No, sir.

16 JUSTICE SOUTER: Why not?

17 MR. SMITH: The decisions of the Court in cases
18 like Atkinson and Montana address the lack of power of a
19 tribe with respect to non-Indian freelance within a
20 reservation.

21 I recognize that there is an added wrinkle here
22 in that the Oneida's rights persist in that land, even
23 though it is out of their possession and that wouldn't
24 have been true in Atkinson, Montana but in that the Courts
25 have held that the possession of the non-Indians as lawful

1 in the sense that it will not be interrupted and the land
2 title can be passed in subsequent transfers, we accept the
3 proposition that Montana and Atkinson would prevent the
4 Oneidas from regulating in any respect, let alone tax any
5 of the land in the possession of non-Indians.

6 JUSTICE SCALIA: Mr. Smith, isn't there any
7 principal of laches that comes into effect here. I mean,
8 what you're asking the Court to do is to sanction a very
9 odd checkerboard system of jurisdiction in the middle of
10 New York state. Some parcels are the ones the Indians
11 choose to buy and are able to buy are called Indian
12 territory and everything else is governed by New York
13 state, isn't it? It's just a terrible situation as far as
14 governance is concerned and part of the blame for the
15 situation we're in is that the Oneidas did not claim about
16 this for 170 years.

17 MR. SMITH: The issues of laches in time is not
18 within the questions presented in this case,
19 notwithstanding that it has been identified in earlier
20 decisions and was actually raised by the counties in this
21 Court in the last go-around. Laches does not bar this
22 claim.

23 These were illegal transactions declared by
24 federal statute to be of no validity in law or equity.
25 The Oneida II decision which holds the background

1 principles of federal law which would ordinarily
2 incorporate state statutes of limitation don't apply
3 because their intention was the underlying rule that only
4 Congress can impair or extinguish this right.

5 JUSTICE SCALIA: The case also held that because
6 of the passage of time and the reliance interest that has
7 developed, we are not going to give you possession.

8 Now, why doesn't the same principle apply to
9 giving you jurisdiction? Because of the passage of time,
10 you can get damages for trespass. Maybe even you can even
11 get the value of the land. It would just create a chaotic
12 situation if we say that you have jurisdiction in the
13 middle of New York state over any pieces of land that you
14 can buy.

15 MR. SMITH: The equitable principles that would
16 inform remedy in an action brought by a tribe out of
17 possession don't apply when a tribe is in possession or
18 else there has been a judicial extinguishment of an
19 underlying right that's only within the power of Congress
20 to extinguish.

21 The Court has been clear that the treaty right
22 here -- we have a federal treaty and it says you have the
23 free use and enjoyment of the land in the New York Indians
24 won the Court said that means the same promise made to the
25 Senecas means that the land cannot be taxed.

1 The argument has been made that the Oneida's
2 only rights are to be paid off now, to be in effect have
3 the un-extinguished federal aboriginal right and the un-
4 extinguished treaty right purchased. Those rights --
5 literally 200 years of decisions -- are within the sole
6 control of Congress. Oneida II made pains to say that
7 this was an unusual situation of thoughtless intention and
8 problems but those problems were for Congress. There are
9 a dozen cases from this Court that deal --

10 JUSTICE GINSBURG: Mr. Smith, at first, would
11 you clarify how much land is now claimed as Indian --
12 within the tribe's aboriginal right? It's not -- one
13 thing clarify while you are not claiming the entire 6
14 million. Didn't they have 6 million acres to start with?

15 MR. SMITH: They did. The matter was litigated
16 in the Second Circuit and resolved adversely to the
17 Oneidas, but I would take the position that the treaty of
18 Canandaigua actually confirms the transfer of land outside
19 of the retained reservation so that the land that we are
20 talking about today as retaining the Oneida's rights I
21 think is approximately 270,000 acres.

22 JUSTICE GINSBURG: Some of that you said was
23 taken up by an approved transfer in 1798?

24 MR. SMITH: Yes, and that's why I'm not saying
25 300,000 acres. I can't do the arithmetic and I don't have

1 the final survey --

2 JUSTICE GINSBURG: But something around 275?

3 MR. SMITH: Around 270.

4 JUSTICE GINSBURG: And the figure, the 250
5 million is for the rental -- what is that -- what is that
6 for?

7 MR. SMITH: In the Cayuga case, there were two
8 elements of damages. One was retrospective, and that was
9 rental damages for past trespass. The other was a current
10 value, because Judge McKern said that he would not evict
11 anyone, and that he thought a suitable alternative to
12 eviction was the award of value, because it would put the
13 tribe in a position to a free-market and voluntary
14 relationship with the purchasers to, quote, "restore its
15 homeland."

16 Judge McKern got really to the heart of this
17 process by recognizing that there are inequities all
18 around, if you will, and that the Court is without the
19 power to extinguish the underlying rights. It's Congress'
20 role, but that there needs to be a sensible way of
21 recognizing those rights today. And what Judge McKern
22 decided is that damages would put the tribe in a position
23 to do what the Oneidas have done with respect to the land
24 that's at issue here before the Court, and that's to make,
25 you know, a fair-and-square deal and pay full value.

1 JUSTICE GINSBURG: Which New York State paid,
2 and that's the end of it.

3 MR. SMITH: Yes, Your Honor. If I understand
4 your question, the answer is yes.

5 JUSTICE SCALIA: Wall, that's not the end of it.
6 From what you're saying, I gather that you believe, in
7 that case, once they purchase the land, it becomes tribal.

8 MR. SMITH: Correct. I mean that's the end of
9 that litigation. There is a judgement, it's gone to the
10 Court of Appeals, and it's there now.

11 The issue of damages remedies when the tribe is
12 out of possession is simply conceptually and fundamentally
13 different than the question of what happens when the tribe
14 has joined possession --

15 JUSTICE BREYER: What do you say are the merits,
16 then, to the claim that there were 300,000 of these acres
17 in 1838 or with the Treaty of Buffalo Creek -- there were
18 300,000 acres that nobody was paying any attention to
19 because there were no tribe members that lived there, so
20 that when you have language in the treaty, under those
21 circumstances, that says their home is now -- where was
22 it? Illinois or --

23 JUSTICE O'CONNOR: Kansas.

24 JUSTICE BREYER: Kansas. Their home is now
25 Kansas. That's the nation. That's the place. And that

1 -- you've heard the language cited. And even though a
2 person says, "You can live here as long as you want," that
3 just means they can live there as long as they want; that
4 doesn't mean it's the reservation. The reservation's
5 sovereignty may have gone to Kansas, though, of course,
6 nobody had to move, unless he struck a fair bargain that
7 he agreed to with the State of New York. I take it that's
8 their argument. I just want to hear your response.

9 MR. SMITH: There are a lot of parts to that.
10 Let me respond to what I think is the most fundamental.

11 JUSTICE BREYER: Yeah.

12 MR. SMITH: That argument rests on the idea that
13 there was an assumption, at the time of the Treaty of
14 Buffalo Creek, that the prior transfers were valid. It's
15 an argument of ratification by assumption. Oneida II
16 says, in a much more forceful circumstance, that even a
17 later federal treaty that explicitly refers to the prior
18 session does not ratify it, because the ratifying language
19 has to be clear and express, and you have to believe that
20 both the Indians and the Congress, the United States,
21 meant to do that.

22 Here, the -- if you think about it, in what I
23 just heard concerning Buffalo Creek, there's an
24 interesting asymmetry. We're supposed to assume that the
25 treaty covered all the land, but we're not supposed to

1 conclude that Ransom Gillet's promise is covered it all.
2 We're supposed to believe that one, by assumption, extends
3 to the entire reservation and that the other, forceful
4 promises of a federal treaty commissioner that you need
5 not go anywhere, are actually very limited and carried
6 with them a thought that they were extinguishing rights in
7 other land. That interaction with Ransom Gillet is
8 crucial. The treaty --

9 JUSTICE KENNEDY: Would not it be odd to have a
10 -- to give assurance that you could buy back what you've
11 lost? Does it -- would that -- that's a very strange
12 construction of the representations intendant upon Buffalo
13 Creek. I understand what you're talking about with the
14 5,000 acres --

15 MR. SMITH: The representations from the federal
16 treaty commissioner were not that they could buy it back.
17 The federal treaty commissioner went to the Oneidas
18 because they would not agree to the treaty. They didn't
19 want to give up their rights. He gave them a piece of
20 paper that was meant to assure them they were not giving
21 up their rights. There was no suggestion in this
22 important interaction that they were bargaining over the
23 loss of other rights. Mille Lacs is directly in point
24 here. Mille Lacs, I think -- well, from Mille Lacs, you
25 can derive the proposition that where the record shows no

1 bargaining over a right, and where the treaty does not
2 refer to the right, the Indians will not be held to have
3 silently yielded their important rights.

4 In the nature of this interaction, you have the
5 suggestion that -- you have a far more important right, in
6 a much larger part of the reservation, that persisted as a
7 matter of federal law. There is nothing about what
8 happened at Buffalo Creek that would suggest that anyone
9 would think they were affecting the Oneida's rights in
10 lands that were not involved in the treaty. Now, the
11 treaty --

12 JUSTICE SCALIA: Mr. Steward, your time is
13 beginning to come up, and there is one thing we haven't
14 talked about that I'd really like to get your view on, and
15 that is the 1788 Treaty -- what was that, Fort Schuyler --
16 Treaty of Fort Schuyler?

17 MR. SMITH: Yes.

18 JUSTICE SCALIA: -- between New York State and
19 the Oneidas. Now, that contained language which said the
20 Oneidas cede and grant all their lands to the people of
21 the state of New York. That was the operative provision.
22 Later on, it -- Article 2 says, "Of the ceded lands" --
23 the ceded lands, lands that have been ceded -- "a tract
24 described by metes and bounds is reserved to the Oneidas
25 to hold to themselves in their posterity forever." Now, I

1 would normally interpret that too mean that the Oneidas
2 gave up all of their sovereignty over the lands and were
3 given back, by the State of New York, the right over this
4 tract designated by metes and bounds.

5 Now, I'm saying I would normally interpret that,
6 except in a treaty with the Indians. In a treaty with the
7 Indians, you say, "Well" -- and we have cases which have
8 language somewhat like this, and they say, "Well, they
9 really didn't cede the part that they reserved." That may
10 be the case in -- ordinarily. But it seems to me, a basic
11 principle of contract law -- of treaty law, of any law --
12 that where there is an ambiguous phrase or provision, you
13 interpret it the way the parties themselves have
14 interpreted it. And it seems to me that the subsequent
15 history, after 1788, indicates that the Oneidas believed
16 that New York State had jurisdiction over that land.

17 MR. SMITH: Actually --

18 JUSTICE SCALIA: The New York State Police were
19 in there. New York State managed the lands.

20 MR. SMITH: Justice Scalia, actually, it's
21 interesting, in the Joint Appendix in the Court of
22 Appeals, at page 413, is the actual document that governed
23 the transfer of this land, the state statute; and in that
24 statute, the state granted its right of preemption to an
25 individual to acquire the land, because it understood that

1 it had not yet exercised its right of preemption. That's,
2 in the conduct of the parties, a direct refutation of the
3 idea that the right of preemption was exercised in the
4 Treaty of Buffalo -- in the Treaty of Fort Schuyler, the
5 1788 treaty.

6 The most fundamental point, though, about the
7 1788 treaty is that next came the 1794 Treaty of
8 Canandaigua, which embodied a federal promise to protect
9 the free use and enjoyment of this land, and the Oneidas
10 possession of it. And that exact promise -- not sort-of-
11 like, but exact -- was held in New York to prevent
12 taxation of the Senecas land.

13 I guess I'd like to make two quick points before
14 I'm out of time.

15 One is that, with respect to the idea that it's
16 just too late, apart from the fact that the question is
17 not presented, I want to emphasize that, in section 2415
18 of Title 28, Congress explicitly focused on the question
19 of these old claims. And if you read the legislative
20 history, all they talked about was how to deal with the
21 Oneida claim and these old claims. And they not only
22 provided that title claims are not barred by statute of
23 limitations, and established the limitations period that
24 would not have run against the Oneidas because they were
25 on a federal list, but they did the following, which I

1 think is notable. The statute provides that these claims
2 approved, in 1966, on the day of the statute, there is no
3 room for background equitable principles in federal law.
4 Where Congress has specifically focused on a problem
5 addressed it, the idea is, I suppose, that there is no
6 room to fill gaps here by the Court when Congress has
7 decided just what the gaps are and how to fill them.

8 The other point that I would make concerns the
9 Treaty of Buffalo Creek. The treaty's language leaves it
10 to both sides to decide whether or not Indians are going
11 to Kansas. The legislature -- the history of the treaty
12 shows that the United States backed away from any language
13 which would oblige it to remove Indians, and the language
14 with respect to the Indians left them a choice.

15 But, ultimately, all of that is controlled by
16 what happened. The Federal Government made a decision
17 that no Indians would go to Kansas. The idea that Buffalo
18 Creek extinguished reservations in New York would seem
19 bizarre to anyone in New York today, because the Onondagas
20 have reservations, the Senecas have reservations, the St.
21 Regis have reservations, the Tonawandas have reservations,
22 the Tuscaroras have reservations, and the Oneidas have
23 reservations. It didn't extinguish just the -- there's
24 the idea that you can look at this in a vacuum -- it
25 didn't just extinguish the Oneida reservations. Under the

1 Santa Fe rationale, the point is not that Congress
2 ultimately intended two reservations, although it has done
3 that often -- the Choctaw, the Mississippi Choctaw, the
4 Seminoles. It frequently happened with removal if there
5 were more than one reservation. But here, you would have
6 to believe that Congress intended no reservations. You
7 would have to believe that Congress quickly came to the
8 decision that none of these Indian tribes in New York
9 actually had a reservation anywhere, and that's not
10 acceptable.

11 Thank you.

12 JUSTICE STEVENS: Thank you, Mr. Smith.

13 Mr. Stewart?

14 ORAL ARGUMENT OF MALCOLM L. STEWART`

15 FOR UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING RESPONDENTS

17 MR. STEWART: Justice Stevens, and may it please
18 the Court:

19 I would like to address, first, the City's
20 argument that the long passage of time renders it improper
21 to give the tribe a tax exemption on lands that have --
22 recently were purchased. That argument is wrong for three
23 reasons.

24 First, if we are correct that the tribe had
25 federally-protected title as of the 1790s and that that

1 federal protection was never validly extinguished, then
2 the fact that the tribe was out of possession of the
3 relevant lands for nearly two centuries is, itself, a
4 distinct and substantial legal wrong, and it would be
5 adding insult to injury to say that precisely because the
6 tribe had suffered that initial injury, it should be
7 disentitled to take advantage of a tax exemption that
8 would otherwise flow from its possession of --

9 JUSTICE SCALIA: I don't -- I don't understand
10 that argument at all. I mean, it's just a general rule
11 that, where you've been wrong, you have to come forward,
12 in a timely fashion, to get the wrong righted. And what
13 difference does it make what the nature of the wrong is,
14 whether it's dispossession or not?

15 MR. STEWART: Well, I think it -- I think it's
16 important to distinguish between two different types of
17 delay. What was at issue in Oneida I and II was delay in
18 bringing the underlying lawsuit. And, even in that
19 context, the Court said that the suit was not barred
20 entirely, but equitable factors might be taken into
21 account in formulating an appropriate remedy.

22 Here, we don't have delay in filing a lawsuit.
23 That is, nobody doubts that the tribes asserted their
24 right to a tax exemption promptly after repurchasing the
25 relevant land. The argument on the other side is that

1 their delay in purchasing the land should be analogized to
2 --

3 JUSTICE O'CONNOR: Well, do you say that a tribe
4 can never lose its sovereign rights to land? Can it
5 acquiesce in the loss of those rights?

6 MR. STEWART: This Court has held that the tribe
7 -- that a tribe may abandon aboriginal title to land.

8 JUSTICE O'CONNOR: Yes.

9 MR. STEWART: It's not --

10 JUSTICE O'CONNOR: Yes, and we have held that a
11 state can abandon sovereignty, as in Massachusetts versus
12 New York.

13 MR. STEWART: But the Court has also held that
14 once Congress creates a reservation, once it confers
15 explicit federal protection on particular lands, the
16 reservation can be diminished or disestablished only by
17 act of Congress; it can't be terminated through adverse
18 possession. And with respect to the question of whether
19 delay in buying the land should be analogized to delay in
20 bringing a --

21 JUSTICE O'CONNOR: Well, that might give them a
22 right to some kind of damages for a violation, but what
23 does that do to the sovereign claims of the tribe?

24 MR. STEWART: I think the -- the reservation
25 would remain a reservation. As Mr. Smith pointed out,

1 with respect to parcels within the reservation that are
2 not owned by Indians, the tribe's regulatory authority is
3 extremely limited and, therefore, the tribe would not be
4 able to exercise anything like plenary regulatory
5 jurisdiction over the whole 270,000 acres.

6 JUSTICE GINSBURG: What is it? You said
7 "extremely limited." This is the first I heard that the
8 tribe might have some authority over part of that, what,
9 the 275- -- 275,000 acres, even though it hadn't
10 repurchased the costs.

11 MR. STEWART: The Court, in Atkinson Trading
12 ,and in Montana versus United States, before that, that
13 said that the tribe may be able to regulate conduct on
14 non-Indian lands to the extent that the conduct involves
15 voluntary transactions with the tribe or its members or to
16 the extent that the regulation is necessary in order to
17 protect the tribe's sovereignty over the land that it
18 possesses is --

19 JUSTICE GINSBURG: But now we're talking about
20 land that -- where there are no tribe members -- as I
21 understand it, this area is predominantly non-tribal
22 members.

23 MR. STEWART: I agree. In -- and Atkinson
24 Trading makes clear that, even when the great bulk of the
25 land is only by the tribe or its members, the tribe's

1 ability to regulate conduct on the non-Indian parcels is
2 sharply limited. That would be doubly true in a tract of
3 this nature.

4 But to return to the point about the state's
5 reliance interest, I think it's -- or the city's reliance
6 interest -- I think it's important to stress that this
7 case is only about taxation, and a municipality can't
8 claim to have the same sort of reliance interest in being
9 able to tax that a potential defendant --

10 JUSTICE BREYER: Well, that may be true, but
11 that's why I wondered about the damage part of it. I'm
12 still thinking that a trespass action for trespasses that
13 occurred in 1850 or 1700 is worth millions today, even if
14 it's tiny, because of the interest, passage of time, et
15 cetera. When you add that to the value of the land, I'm
16 thinking of numbers that are astronomical. And yet that
17 hasn't happened.

18 And so, what actually, as a -- and that's why
19 I'm thinking, isn't a damage action far more serious than
20 simply taking property off the tax rolls?

21 MR. STEWART: That's true, but --

22 JUSTICE BREYER: And that's why I want to know
23 how, in practice, this works out. Does Congress have the
24 power, for example, to deal with it? Is what we're
25 considering in this case simply a negotiating position and

1 strengthening people's hands, vis a vis legislation?
2 What's going on?

3 MR. STEWART: Congress does have the power to
4 deal with it. And at the end of the Court's opinion in
5 Oneida II, the Court expressed confidence that, up to this
6 point, has not been borne out, that Congress would fix the
7 problem.

8 JUSTICE O'CONNOR: Yes, Congress has done
9 nothing about this, has it? Can -- has the tribe asked,
10 administratively, for the Bureau of Indians Affairs to
11 recognize it now as a tribe?

12 MR. STEWART: Well, the Bureau of Indian Affairs
13 has recognized the tripe all along. That is, under the
14 Treaty of Canandaigua, the Federal Government was required
15 to pay annuities and treaty cloth to the six nations, and
16 the Federal Government has done that continuously since
17 the beginning. So we've always recognized this to be a
18 tribe.

19 And I think you're -- you've put your finger on
20 an important point, Justice Breyer, in that the Court, in
21 Oneida II, said that it hoped that Congress would fix the
22 problem, and thought that it would, but said that even if
23 Congress doesn't legislate a solution, the suit can go
24 forward. The Court contemplated that equitable
25 considerations could be taken into account in formulating

1 a remedy, but it certainly didn't contemplate that the
2 tribe, at the end of the day, would be left without any
3 remedy at all. And, as you point out, if the tribe can
4 sue for damages, it seems farfetched to think that it
5 wouldn't be able to reassert the tax immunity that --

6 JUSTICE GINSBURG: What tax -- what taxes are
7 we talking about? Is this property tax? Are we also
8 talking about sales tax?

9 MR. STEWART: No, the Court has said -- the
10 Court has said, as a general matter, as a matter of
11 federal law, a tribal merchant on tribal land can be
12 required to collect sales taxes from non-Indians, at least
13 for the purchase of goods that were purchased off the
14 reservations.

15 JUSTICE SCALIA: Well, it isn't just taxes we're
16 talking about. It's jurisdiction over these parcels of
17 land. It -- I mean, taxes -- that's just one aspect of
18 saying that this land no longer belongs to New York State.

19 MR. STEWART: I mean, taxes are the only thing
20 at issue -- are the only thing that's at issue in this
21 case. But I agree that holding this parcel to be a
22 reservation would have implications for regulatory
23 jurisdiction, as well. Now, there isn't a categorical
24 rule of federal law that says that states and localities
25 absolutely cannot regulate conduct on tribal lands within

1 the reservation. Rather, there is a preemption test --
2 there's certainly a thumb on the scale in favor of an
3 exemption from state and local regulation where tribal
4 reservation lands are involved.

5 JUSTICE KENNEDY: Mr. Stuart, I have one
6 question about, Buffalo Creek. If we hold that Buffalo
7 Creek didn't disestablish the reservation, then doesn't
8 the New York Indian case rest on a false premise because
9 that case gave \$2 million for failure to give the Kansas
10 lands?

11 MR. STEWART: Well, the Court, in the New York
12 Indians II, recognized, to start with, that the treaty
13 affected an immediate session of the Oneida's Wisconsin
14 lands to the Federal Government, and the Court
15 specifically noted that that session, in and of itself,
16 would be sufficient consideration to support a contract
17 between private parties. So it simply isn't correct to
18 say that the New York Oneidas gave up something other than
19 a promise to remove. The second --

20 JUSTICE SOUTER: Was there any positive
21 indication -- I just don't remember this -- in the New
22 York case, that they would -- that they, in fact, had
23 ceded anything of New -- of their interest in New York?
24 As distinct from the Wisconsin land.

25 MR. STEWART: I mean, there were references to

1 the primary inducement to the Federal Government's
2 entering into the treaty being the desire for --

3 JUSTICE SOUTER: That's entering into the
4 treaty. But when it came to compensation, was there an
5 indication that they were being compensated for anything
6 other than Kansas land, which they had obtained as a
7 result of ceding their Wisconsin land?

8 MR. STEWART: No. No.

9 JUSTICE SOUTER: Okay.

10 MR. STEWART: The compensation was strictly for
11 the Kansas lands that were denied to them. And it's
12 important to note that the Senecas --

13 JUSTICE SOUTER: But there was no indication
14 that they got Kansas for anything other than Wisconsin, is
15 that correct?

16 MR. STEWART: They got -- I mean, they didn't --
17 they weren't held to have promised -- made a commitment to
18 remove from New York. No, clearly, in analyzing the
19 reasons --

20 JUSTICE SOUTER: But there was no indication
21 that they had ceded anything with respect to title in New
22 York, was there?

23 MR. STEWART: That's correct.

24 JUSTICE SOUTER: Okay,

25 JUSTICE SCALIA: Well, it rested upon the

1 session in Wisconsin?

2 MR. STEWART: It rested, in part, upon the
3 session in Wisconsin. It rested, in part, on a fairly
4 technical argument, to the effect that the grant of Kansas
5 lands was on en presente. That is, it was a present grant
6 of Kansas lands, and, therefore, the New York Indians
7 could be disentitled to those lands only if they had -- a
8 forfeiture had been established. And the Court looked to
9 Article 3 of the treaty to determine the conditions for
10 forfeiture. It said that the Federal Government would
11 have been required to allege a forfeiture by legislative
12 or judicial act, et cetera.

13 The other thing I really wanted to -- the point
14 I wanted to make about the reliance interest of the taxing
15 jurisdiction are that no matter how long a particular
16 tract has been taxable, it is -- may I finish this? -- it
17 is always within the realm of a city's contemplation that
18 it may be bought up tomorrow by the Federal Government, a
19 church, any other tax-exempt entity, and, consequently,
20 the municipality can have no sense of repose that it will
21 remain taxable.

22 Thank you.

23 JUSTICE STEVENS: Thank you, Mr. Stewart. The
24 case is submitted.

25 [Whereupon, at 11:06 a.m., the case in the

1 above-entitled matter was submitted.]

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