

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 CITY OF SHERRILL, NEW YORK, :

4 Petitioner, :

5 v. : No. 03-855

6 ONEIDA INDIAN NATION OF NEW :

7 YORK, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, January 11, 2005

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

13 APPEARANCES:

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

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

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

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

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	IRA S. SACKS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	CAITLIN J. HALLIGAN, ESQ.	
7	For New York, as amicus curiae,	
8	Supporting Petitioner	17
9	ORAL ARGUMENT OF	
10	MICHAEL R. SMITH, ESQ.	
11	On behalf of the Respondents	26
12	ORAL ARGUMENT OF	
13	MALCOLM L. STEWART, ESQ.	
14	For United States, as amicus curiae,	
15	Supporting Respondents	41
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

[10:05 a.m.]

JUSTICE STEVENS: We will now hear argument in the case of City against -- 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 have been in private non-Indian hands, have been freely alienable, have been transferred to innumerable

1 innocent purchasers and have been subject to the full panoply of
2 state and local laws including taxation.

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

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

18 The possessory right we're talking about, aboriginal
19 title or some other tribal possessory right, isn't just a
20 concept. As this Court has defined aboriginal title of those
21 possessory rights, it's a right to current possession. And
22 under this Court's decisions in cases such as Felix versus
23 Patrick and Yankton Sioux, and Williams and Mitchell and Santa
24 Fe, all of which were cited in the dissent written by Justice
25 Stevens, for the, for members of dissent in Oneida II, tribal

1 possessory rights are barred by that passage of time, the change
2 in the character of the land and the innumerable innocent
3 purchasers.

4 JUSTICE BREYER: Why does not having a possessory
5 right mean that the city could tax them, or the State?

6 MR. SACKS: The basis for the tax immunity here is
7 that this land does not have Indian country status. For this
8 land to have Indian country status, it has to be, in our view,
9 under this Court's Venetie decision, Federal set-asides and
10 Federal superintendence.

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

15 JUSTICE BREYER: No, I'm just thinking, that suppose
16 you have a reservation but the tribe doesn't have a possessory
17 right because in the middle of the reservation, there is some
18 kind of long-term lease or a sale to a house that's owned by
19 somebody else who is not a member of the tribe. I would think
20 -- am I right that the city or the county in which that
21 reservation sits can't tax it anyway?

22 MR. SACKS: Right. I absolutely agree with you.

23 JUSTICE KENNEDY: All right. So if you were to say
24 the tribe does not have a possessory right, they can't go in and
25 eject all the people who are living there and built houses over

1 the last 192 years. That doesn't mean still that you could tax
2 them.

3 MR. SACKS: But your hypothetical, Your Honor,
4 presupposed the existence of the reservation and presupposed a
5 possessory right subject to lease. The possessory right here
6 did not exist because the Oneida Indian nation had no rights
7 with respect to the land at all in 1997. Those rights could not
8 be enforced. And for the right not to be --

9 JUSTICE KENNEDY: Well, they couldn't be enforced
10 against certain innocent purchasers but when the land is
11 reacquired, then it seems to me we have to ask whether there was
12 an extinction of aboriginal title and whether the reservation
13 was at some point subsequently disestablished by federal act.
14 And if we hold against you on the ground that there was no
15 extinction of aboriginal title and there was no disestablishment
16 of the reservation, then it seems to me that when they
17 reacquire, we get to exactly the point that Justice Breyer
18 raises and that is, once they reacquire the land, why does it
19 become taxable? Why does its nontaxable status not simply
20 reassert itself?

21 MR. SACKS: I think that you have to look at the
22 definition of Indian country. If you look at the definition of
23 Indian country, it requires, with respect to the properties
24 we're talking about, federal set-aside and federal
25 superintendence.

1 JUSTICE KENNEDY: So you're saying if the original
2 establishment of the reservation was simply a continuation, was
3 literally a reservation from a transfer of land to the State of
4 New York and that the Indian title was a purely aboriginal
5 title, not a title conferred by a federal act creating a
6 reservation, that it cannot be Indian country, is that correct?

7 MR. SACKS: If I understand the question that you
8 asked, Your Honor, if the title came from the State of New York,
9 for example, in the --

10 JUSTICE KENNEDY: Let's assume the title is
11 aboriginal. Nothing in an act of the United States says we're
12 giving this land to the Indians, e.g., in the Kansas situation.
13 It's simply aboriginal title and it was never extinguished.

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

17 MR. SACKS: No, Your Honor.

18 JUSTICE KENNEDY: Okay.

19 MR. SACKS: No. In a situation where there was
20 continuing aboriginal title, similar to the Senecas in the State
21 of New York where New York State did not terminate the
22 aboriginal rights of the Senecas, there need not be
23 congressional act, there need not be congressional or treaty
24 action to establish the reservation.

25 JUSTICE KENNEDY: So this part of your argument

1 depends on our accepting your position on the Treaty of Fort
2 Schuyler as being a conveyance of all property and a later
3 retrocession, is that correct?

4 MR. SACKS: No, Your Honor

5 JUSTICE KENNEDY: Because otherwise, I don't see
6 what extinguished the aboriginal title.

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

18 The land is predominantly non-Indian. And as this
19 Court observed in Hagen and Rosebud Sioux, a finding that the
20 land now comes back into tribal jurisdiction, to paraphrase,
21 seriously disrupts the justifiable expectations of the community
22 and that's not just a hypothetical in this case.

23 JUSTICE BREYER: I know that, but I mean, then it
24 seems to me if one thing that Oneida establishes is that the whole
25 title doesn't just disappear if nothing else happens, simply

1 because of the passage of time.

2 MR. SACKS: I think what disappears, Your Honor

3 JUSTICE BREYER: Is what?

4 MR. SACKS: -- is the right to possess.

5 JUSTICE BREYER: Now we agree with that or I'll
6 hypothetically agree with that. They can't come in and eject
7 people. But then I'm back to my first question, because I take
8 it that the refusal in Oneida to the suggestion that they can't
9 go, say, to Buffalo, New York, or wherever, or some town and
10 throw everybody out of the house, that that, of course, does
11 reflect the passage of time. But for a city or State to tax the
12 land, that doesn't involve the same kind of interference with
13 people's expectation of living in the houses that they bought,
14 that throwing someone out of his house would involve.

15 MR. SACKS: Here's what impacts the expectations.
16 What impacts the expectations is the following. I'll give you
17 an example that appears from the joint appendix on the Court of
18 Appeals from pages 1263 to 1277.

19 In the year 2000, the City of Oneida cited two
20 Oneida Indian Nation businesses, a convenience store and a gas
21 station, for 16 fire code violations. The tribe citing this
22 Court's decision in Brendale said, we're not governed by the
23 local fire code. We're governed by tribal jurisdiction. It's
24 more than just the interference, the issue of taxation, the
25 issue of sovereignty is whether a gas station is going to blow

1 up or burn down --

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

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

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

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

12 JUSTICE O'CONNOR: All right. Now what do we do
13 with the Oneida II case decided in 1985?

14 MR. SACKS: This, the position we're taking here is
15 fully consistent with Oneida II. In Oneida II, this Court held
16 that there was a violation of federal common law principally
17 because of a violation of the Nonintercourse -- Indian Trade and
18 Intercourse Act in 1795. This Court wasn't asked to deal with,
19 at that time, with the Treaty of Fort Schuyler. It wasn't asked
20 to deal with the Treaty of Buffalo Creek. It wasn't presented
21 with evidence of the numerous authorized New York State treaties
22 in 1840 through 1846 that diminished this reservation, that the
23 State of New York will deal with -- with as amicus --

24 JUSTICE SCALIA: Why not? Why not? Why not? I
25 mean, is every decision we make up for review when the

1 interested parties fail to cite the, what they now assert are
2 the dispositive acts?

3 MR. SACKS: No, Your Honor. I think that principles
4 of stare decisis still govern and I think what, and this is
5 consistent with the position that we have taken with respect to
6 the passage of time extinguishing the possessory right, is what
7 this Court for stare decisis purposes found in Oneida II was
8 that there was a violation of federal common law with respect to
9 a transfer that was very different than this transfer, without
10 any examination of the Treaty of Buffalo Creek and without any
11 examination of the Treaty of Fort Schuyler.

12 JUSTICE SCALIA: But there wouldn't have been a
13 violation of federal law if this were not Indian country, if
14 this were not an Oneida reservation when the transfer occurred.

15 MR. SACKS: Your Honor, that might or might not be
16 correct, depending on how one views the scope of the
17 Nonintercourse Act. But if one views the scope of the
18 Nonintercourse Act to apply to Indian reservations, even state
19 reservations, as the Second Circuit in Mohican Tribe has held,
20 then the Treaty of Fort Schuyler could have terminated all
21 aboriginal title; The Treaty of Fort Schuyler could have
22 established a state reservation for the Oneidas; and the
23 Nonintercourse Act of 1790, two years later, could have
24 prohibited the sale of those lands even though it was a state
25 reservation and under state jurisdiction.

1 JUSTICE SCALIA: Is that the application of the
2 Nonintercourse Act? I assume it applied only to federal act
3 reservations.

4 MR. SACKS: Well, this Court has not dealt with that
5 issue and from our purposes --

6 JUSTICE SCALIA: How does it read? What does it
7 say?

8 MR. SACKS: The Nonintercourse Act

9 JUSTICE SCALIA: Well, I didn't mean to interrupt
10 you.

11 MR. SACKS: The Nonintercourse Act in effect at the
12 time prohibited the purchase made -- prohibited the purchase of
13 lands from Indians or Indian tribes, to paraphrase. And that
14 would have, and what hasn't --

15 JUSTICE O'CONNOR: Unless made by treaty or
16 convention entered into pursuant to the Constitution.

17 MR. SACKS: Yes. Yes , unless -- unless -- unless
18 subject to federal approval.

19 JUSTICE GINSBURG: An idea of precisely what's at
20 stake within the Oneida litigation, as I understand it, the
21 counties and the municipalities, the City of Sherrill
22 would not be left in the end having to pay; New York would.

23 MR. SACKS: The City of Sherrill is not a party in
24 the land claim litigation. The land claim litigation --

25 JUSTICE GINSBURG: Well, from the county's point of

1 view, I'm asking who pays at the end of the line. And it seems,
2 in the Oneida cases, it's the State. Is it different here? And
3 what taxes are we talking about precisely?

4 MR. SACKS: What we are talking about -- to answer
5 the first portion of your question, Justice Ginsburg, I think
6 ultimately the citizens of the State of New York pay but it is,
7 the judgment would be against either the State of New York or
8 the against the counties in the land claim. In this case --.

9 JUSTICE SCALIA: What goes with the taxes? You've
10 said that the other effect will be that whenever the Oneidas buy
11 a piece of property that is within this former reservation, and
12 of which only 1 percent is now owned by Indians, whenever they
13 buy a piece of property, that property is taken off the tax
14 rolls.

15 MR. SACKS: Correct, Your Honor.

16 JUSTICE SCALIA: Which, of course, makes it a lot
17 easier for them to buy it because it's much less expensive for
18 them to hold that land. What else happens? The --

19 MR. SACKS: What else happens is that

20 JUSTICE SCALIA: The town can't regulate.

21 MR. SACKS: The town can't regulate it and if they
22 are running a business on it, and we believe this is contrary to
23 state law, but if they are running a business on it they're not
24 collecting sales taxes.

25 JUSTICE KENNEDY: And I assume it also means that

1 that land cannot be repurchased by non-Indians?

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

6 With the Court's permission, I want to, I do want
7 turn to the 1788 Treaty of Fort Schuyler and, time permitting,
8 the 1794 Treaty of Canandiagua. Our position on the treaty of
9 Fort Schuyler I think is very plain in our papers and I just
10 want to highlight what's in the rest of the treaty after
11 Article 1, which is a cessionable land. What's in the rest of
12 the treaty is that New York reserved numerous rights even with
13 respect to the reservation's land. New York had, among other
14 things, the right to make and apply laws to the reservation, to
15 enforce the treaty -- and I'm quoting from Article 4 -- in such
16 manner as the State shall deem proper.

17 New York had the right to enforce its criminal laws
18 with respect to intruders on the reservation that New York
19 granted to the Oneidas obtaining the assistance of the Oneidas
20 to do so. New York, in the treaty, prohibited the Oneidas from
21 selling the lands. New York, in the treaty, prohibited the Oneidas
22 from certain length of leases and New York had the right to
23 enact laws with respect to the leases that were permitted to
24 enforce the leases.

25 The other thing that one needs to look at in the

1 context of the times, when looking at how would the Oneidas have
2 understood this, the tribes of the Iroquois Confederacy, knew
3 how to preserve their aboriginal title when they wanted to do so
4 and the Oneidas didn't do that. In the 1797 Big Tree agreement
5 with the Senecas which is published at 7 Statutes at Large, 601,
6 the Senecas sold much of their lands through Robert Morris under
7 the approval of the United States.

8 In the agreement, the agreement provided that the
9 reserved lands were, and I quote, "clearly and fully understood
10 to remain the property of the Senecas in as full and ample
11 matter as if these presents had not been executed." That is the
12 way an Indian tribe understood preserving aboriginal title.
13 That didn't happen in the Treaty of Fort Schuyler.

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

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

18 The other thing that one has to look at at the time
19 is what New York State was doing. New York State entered into
20 three similar treaties at the time. One with the Oneidas, one
21 with the Cayuga and one with the Onondaga. Those three treaties
22 all terminated aboriginal title in the first provision. The
23 other three tribes of the Iroquois were not of concern.

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

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

3 The other three tribes of the Iroquois were not of
4 concern to New York State in 1788 because the Mohawks had mostly
5 removed to Canada, the Tuscaroras had no land of their own and
6 the Senecas were in the portion of New York State where
7 Massachusetts had the preemption right. So if you look at what
8 is happening back in 1788 and early 1789, New York State is
9 setting up a State treaty with the Oneidas and keeping
10 jurisdiction over those lands.

11 Now, to go back to what you asked earlier, Justice
12 Scalia, no question that if in that context, the Federal
13 Government then passed a statute that says, as it may, the
14 Oneidas can't sell this land without federal approval. That's a
15 violation of the Nonintercourse Act, but it doesn't change the
16 fundamental nature of the land as being under state
17 jurisdiction, and has been under state jurisdiction since 1788.

18 JUSTICE GINSBURG: Was there ever any federal
19 superintendence of the land?

20 MR. SACKS: If you count an agent going on the land,
21 there was an agent on the land, but what has happened with this
22 land in terms of federal superintendence is that this land has
23 been superintended, and supervised whether in tribal hands or
24 otherwise, by the State of New York and local governments since
25 1788.

1 There is a reference in our papers to a report, it
2 was issued in connection with the New York State setting up
3 their troopers to cover the reservations, and that report
4 acknowledged that the United States Government appreciated the
5 fact that the State of New York had been keeping peace on the
6 reservations with their police and saw no reason to interfere
7 with over 100 years -- and this was in the early 20th century --
8 of over 100 years of state police supervision.

9 JUSTICE SCALIA: It isn't the FBI that keeps peace
10 on other reservations, is it? Isn't it quite standard for state
11 law enforcement to function?

12 MR. SACKS: Sorry I see my light is on.

13 JUSTICE SCALIA: Can he answer that?

14 JUSTICE STEVENS: Yes, go ahead and answer the
15 question.

16 MR. SACKS: The level of -- yes, Your Honor. It
17 is, the FBI doesn't do it, States often do it. They do it
18 sometimes with the permission but this happened for 200 years.

19 JUSTICE STEVENS: Thank you, Mr. Sacks.

20 Ms. Halligan.

21 ORAL ARGUMENT OF CAITLIN J. HALLIGAN

22 FOR NEW YORK, AS AMICUS CURIAE,

23 SUPPORTING PETITIONER

24 MS. HALLIGAN: Justice Stevens, and may it please
25 the Court:

1 The State of New York was granted time to address
2 the third question presented regarding the 1838 treaty which we
3 believe requires reversal of the decision below because it
4 disestablishes the Oneida reservation. Respondents claim that
5 they can now exercise sovereignty over any plot of land they buy
6 within a vast 300,000 acre tract in Central New York that has
7 long been inhabited almost entirely --

8 JUSTICE O'CONNOR: Is sovereignty something that the
9 tribe can lose by inaction over a period of time?

10 MS. HALLIGAN: I believe that it is, Your Honor, for
11 the reasons that are laid out in petitioner's brief, but
12 regardless of what the Court decides about that question, the
13 Treaty of 1838 clearly disestablishes the reservation, which
14 terminates all sovereignty prospectively. The language in the
15 historical context --

16 JUSTICE O'CONNOR: The Buffal Creek --

17 MS. HALLIGAN: Yes, Your Honor.

18 JUSTICE O'CONNOR: Treaty.

19 MS. HALLIGAN: Yes, the Treaty of Buffalo Creek.
20 It makes clear both the language of the treaty itself as well
21 as its historical context that it was intended to terminate
22 Oneida sovereignty in New York State.

23 JUSTICE O'CONNOR: What you seem to be asking is to
24 infer from that treaty that the prior unlawful land sales of the
25 Oneida's New York reservation were somehow ratified.

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

6 JUSTICE O'CONNOR: But if you're right about Buffalo
7 Creek, it would mean that the effect of the Government's
8 decision to repossess something in Kansas was to leave the
9 Oneidas without any land.

10 MS. HALLIGAN: Well, at that point the Oneidas --

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

15 MS. HALLIGAN: With regard to the 5,000 acres that
16 they occupied as of 1838, one could read Ransom Gillett's
17 assurances to the Oneidas as allowing them to continue to retain
18 occupancy over that narrow slice of land, but what that cannot
19 do is change the language of the treaty which makes clear that
20 the reservation is otherwise entirely disestablished. And if I
21 can refer to some of the language of the treaty itself, first of
22 all, the treaty explicitly states that its purpose was to carry
23 out the Government's policy in removing the Indians from the
24 east to the west of the Mississippi. That simply cannot be
25 squared with ongoing sovereignty over the remaining 295,000

1 acres which they now claim --

2 JUSTICE SCALIA: Sure it can. I mean, one way to
3 pursue that policy is to offer them lands in the west if they
4 want to go there. That would certainly pursue the Government's
5 policy of removing them.

6 MS. HALLIGAN: This Court held that in New York
7 Indians that Article 13 of the treaty which provides that the
8 Oneidas agree to remove was sufficient to effect a present grant
9 of the Kansas lands and to avoid any forfeiture. So it was much
10 more than an agreement to agree or an offer, if you will. But
11 --

12 JUSTICE SCALIA: So you're saying there is no
13 consideration. If, they simply agree to remove if they -- if they
14 want to remove.

15 MS. HALLIGAN: No, they did receive, they did
16 receive consideration and the Court made sure that that was --

17 JUSTICE SCALIA: No, they gave none, I'm talking
18 about.

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

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

23 MS. HALLIGAN: No, Your Honor; I'm saying that --.

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

25 [Laughter.]

1 MS. HALLIGAN: Well, then in that case, I suppose I
2 should agree. My apologies. But what they did was to agree to
3 remove, and in fact, that's what happened. If you look at what
4 transpired immediately following the treaty, by 1846, all but
5 350 acres, down from 5,000, have been sold by the Oneidas and
6 very few remain.

7 By 1920, there are only 32 acres. And the U.S.'s
8 activities in the area also confirm that that was the
9 understanding of the treaty, that it terminated sovereignty.
10 There are some very sparse references in the records to some
11 exercise of jurisdiction by the U.S. starting around the turn of
12 the century, around the early 1900s, but those only relate to
13 the 32 acres that remained occupied by the Oneidas. There is no
14 indication of any exercise of U.S. jurisdiction over the
15 remaining 295,000 acres.

16 JUSTICE BREYER: I thought that perhaps the Treaty
17 of Buffalo Creek is thinking of 50,000 acres where these
18 particular Indian tribe members had their homes, or at least
19 arguably. Just no one was thinking about the remaining 300,000
20 because they had long left those. It had nothing to do with
21 them.

22 MS. HALLIGAN: I believe the text and the historical
23 background suggests otherwise, Your Honor. Article 4 of the
24 treaty says that the Kansas lands will be the new homes of the
25 Oneidas and it also explains where the Oneidas can exercise

1 sovereignty. It says that it will secure to the Oneidas in the
2 Kansas lands, in said country, which refers to the Kansas lands,
3 the right to establish their own form of government, to appoint
4 their own officers and to administer their own laws. That means
5 that sovereignty is to be in Kansas, not to be in New York.

6 JUSTICE SOUTER: Well, It means that that's what was
7 intended but what do you make of all of the testimony about the
8 representations made by -- I forget the man's name

9 MS. HALLIGAN: Gillett.

10 JUSTICE SOUTER: -- the government's
11 representative, to the effect you don't have to leave New York.

12 MS. HALLIGAN: That related only to the 5,000 acres
13 that they occupied at that time. The record isn't very clear
14 about why he made that assurance.

15 JUSTICE SOUTER: No, but my, I guess, let me just
16 get to the point and you can answer that.

17 MS. HALLIGAN: Yes Your Honor, sorry.

18 JUSTICE SOUTER: Doesn't that negate your argument
19 that the treaty as such disestablished the reservation?

20 MS. HALLIGAN: No, Your Honor, it doesn't. The
21 treaty on its terms appears to disestablish the reservation
22 entirely. Gillett's statement could perhaps be read as a
23 subsequent gloss on that treaty to assure the Indians that they
24 won't be forced off their land, the 5,000 acres that they
25 continue to occupy, perhaps because since New York was not a

1 party to the treaty, there couldn't be any explicit session
2 language in the treaty.

3 New York was the only entity that had a right to buy
4 that remaining 5,000 acres because it held the right of
5 preemption. So it may have been that the Oneidas wanted to
6 ensure that they could reach reasonable terms. And they did.
7 They sold almost all of that land within the following six years
8 after proclamation of the treaty. So the contemporaneous history
9 squares with that.

10 It's very similar to what happened in Santa Fe, in
11 which this Court said there was a reservation that was created
12 for the Santa Fes, there was some indication of acceptance of
13 that reservation, and that acceptance was sufficient to
14 terminate the tribe's sovereignty over any lands outside of the
15 reservation that was provided to them, even though many of them
16 did not in fact remove to that land.

17 Here the Oneidas received much more. Not only did
18 many of them sell the lands and leave immediately but they
19 received the benefit of their bargain by recovering compensation
20 for the Kansas lands from this Court in New York Indians.

21 JUSTICE BREYER: What is the precise language that
22 you think relinquished, changed the sovereignty that -- changed
23 the sovereignty?

24 MS. HALLIGAN: I think there are several provisions,
25 Your Honor.

1 First of all, in the recitals, it states that the
2 purpose of the treaty is to carry out the Government's policy in
3 removing the Indians from the east to the west of the
4 Mississippi.

5 Article 2 also notes that the Kansas lands will be a
6 permanent home for all Indians now residing in the State of New
7 York as well as elsewhere, and Article 4 states that there will
8 be an exercise of sovereignty. It says specifically that will
9 they will be able to establish their own form of government,
10 appoint their officers and administer their laws in the Kansas
11 land specifically. So I think those are the strongest
12 provisions.

13 I would also like to touch for a moment if I can on
14 a question that several members of the Court have raised which
15 is what is the impact of this decision here. From the
16 perspective of the State of New York and the localities, it's
17 very serious because it does concern whether or not the tribe
18 can unilaterally regain sovereignty over a very large tract of
19 land in central New York. This is an area that has been --

20 JUSTICE O'CONNOR: Well, there are implications from
21 Oneida II case that the Indians can reacquire land and assert
22 some kind of possessory right.

23 MS. HALLIGAN: With regard to a narrower swath of
24 land than what's at issue here. And in any event, the Court
25 expressly did not pronounce on the effect of the Buffalo Creek

1 treaty here.

2 If that's the case, what could well result is a
3 patchwork quilt of jurisdiction which this Court has said poses
4 tremendous governance problems. It's governance by tract book.
5 This is not just hypothetical. There are already difficulties
6 that have started to arise as a result of the Second Circuit's
7 decision.

8 For example, another tribe relying on the decision
9 here purchased land within its original land claim area that's
10 just 300 yards from a local high school and have begun operation
11 of a gaming hall there. The locality attempted to enjoin
12 operation of the gaming hall, but was unable to do so in light
13 of the Second Circuit's decision below.

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

24 If there are no further questions --

25 JUSTICE STEVENS: Thank you, Ms. Halligan.

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

2 ORAL ARGUMENT OF MICHAEL R. SMITH

3 ON BEHALF OF RESPONDENTS

4 MR. SMITH: Justice Stevens, and may it please the
5 Court:

6 There was a suggestion in answer to an earlier
7 question that the Oneidas have changed their position about
8 whether the land is alienable when in their hands. That's not
9 correct. There is nothing in the record to suggest that.

10 What the record does suggest at page 213 of the
11 joint appendix is that Sherrill has changed its position. It
12 wanted an easement on Oneida land in 1997 and at that page of
13 the appendix, you will see that Sherrill went to the Department
14 of the Interior for Federal approval of the easement under
15 Federal law, understanding at the time the Oneida's position and
16 the Federal law principle that the land wasn't subject even to
17 an easement absent the Secretary's approval.

18 JUSTICE SCALIA: So you're saying your position was
19 and is that it's not inalienable without the approval of the
20 feds?

21 MR. SMITH: Yes. And the land, when the Oneida's
22 possession of the land, actual possession is unified with their
23 underlying Federal property and treaty rights, the land is
24 inalienable and cannot be sold today out of the Oneida's
25 possession any more than it could 200 years ago.

1 JUSTICE SCALIA: But it, the portion within the
2 reservation you claim is alienable so long as it's not owned by
3 an Oneida. The current owners can sell it to somebody else,
4 right?

5 MR. SMITH: Your Honor, the point of Oneida II --
6 the answer is yes. The answer is yes.

7 JUSTICE SCALIA: Yes or -- Does that strike you as
8 strange?

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

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

22 MR. SMITH: No, Justice O'Connor. The Courts have
23 ruled that we may not do that and it is the position and I will
24 say it clearly here today that the Oneidas do not assert a right
25 to evict landowners in the land claim area. Judge McKern who

1 handled --

2 JUSTICE O'CONNOR: But if it's owned by the State of
3 New York, if it's been acquired somehow by the State, then what?

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

8 What I'm saying is that we are not asking a Court
9 and do not expect a Court to evict anyone from action -- from
10 land that is not in our actual possession.

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

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

1 continuing --

2 JUSTICE BREYER: What was the acreage there?

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

5 JUSTICE BREYER: Well, that may not be worth as
6 much. Maybe this includes several cities and towns? What do
7 you think it is? I mean in other words, the answer to my
8 question is in principle, yes. In principle, if the Indian
9 tribe owns 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 Oneida II is that
12 a damages remedy is appropriate as to a tribe out of possession,
13 but there is no suggestion that that is a judicial sale of the
14 underlying federally protected treaty rights --

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

23 MR. SMITH: Yes, Your Honor. Well, they're entitled
24 to two items of value. They're entitled to retrospective
25 damages for trespass, and in that the Court has not --

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

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

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

11 JUSTICE SOUTER: Do the, would the Oneidas have a
12 claim to tax the current property owners?

13 MR. SMITH: No, sir.

14 JUSTICE SOUTER: Why not?

15 MR. SMITH: The decisions of the Court in cases like
16 Atkinson and Montana address the lack of power of a tribe with
17 respect to non-Indian fee lands within a reservation.

18 I recognize that there is an added wrinkle here in
19 that the Oneida's rights persist in that land, even though it is
20 out of their possession and that wouldn't have the same -- that
21 wouldn't have been true in Atkinson and Montana, but in that
22 the Courts have held that the possession of the non-Indians is
23 lawful in the sense that it will not be interrupted and the land
24 title can be passed in subsequent transfers, we accept the
25 proposition that Montana and Atkinson would prevent the Oneidas

1 from regulating in any respect, let alone taxing, any of the
2 land in the possession of non-Indians.

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

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

18 These were illegal transactions declared by Federal
19 statute to be of no validity in law or equity. The Oneida II
20 decision which holds that background principles of Federal law
21 which would ordinarily incorporate state statutes of limitation
22 don't apply because their intention with the underlying rule
23 that only Congress can impair or extinguish this right. Those
24 same --

25 JUSTICE SCALIA: The case also held that because of

1 the passage of time and the reliance interests that have
2 developed, we are not going to give you possession.

3 Now, why doesn't the same principle apply to giving
4 you jurisdiction? Because of the passage of time, you can get
5 damages for trespass. Maybe even you can get the value of the
6 land. But it would just create a chaotic situation if we say
7 that you have jurisdiction in the middle of New York State over
8 any pieces of land that you can buy.

9 MR. SMITH: The equitable principles that would
10 inform remedy in an action brought by a tribe out of possession
11 don't apply when the tribe is in possession or else there has
12 been a judicial extinguishment of an underlying right that's
13 only within the power of Congress to extinguish. The Court has
14 been clear that the treaty right here -- we have a Federal
15 treaty and it says you have the free use and enjoyment of the
16 land. In the New York Indians I, the Court said that means
17 similar, the same promise made to the Senecas means that the
18 land cannot be taxed.

19 The argument has been made that the Oneida's only
20 rights are to be paid off now, to be in effect have the
21 un-extinguished Federal aboriginal right and the un-extinguished
22 treaty right purchased. Those rights through literally 200
23 years of decisions are within the sole control of Congress.
24 Oneida II made pains to say that this was an unusual situation
25 fraught with some tension and problems, but those problems were

1 for Congress. There are a dozen cases from this Court that deal
2 --

3 JUSTICE GINSBURG: Excuse me, Mr. Smith, first,
4 would you clarify how much land is now claimed as Indian --
5 within the tribe's aboriginal right? It's not -- well, for one
6 thing clarify while you are not claiming the entire 6 million.
7 Didn't they have 6 million acres to start with?

8 MR. SMITH: They did. The matter was litigated in
9 the Second Circuit and resolved adversely to the Oneidas, but I
10 would take the position that the Treaty of Canandaigua actually
11 confirms the transfer of land outside of the retained
12 reservation, so that the land that we are talking about today as
13 retaining the Oneida's rights is I think approximately 270,000
14 acres.

15 JUSTICE GINSBURG: But some of that you said was
16 taken out by an approved transfer in 1798?

17 MR. SMITH: Yes, and that's why I'm not saying
18 300,000 acres. I can't do the arithmetic and I don't have the
19 final survey --

20 JUSTICE GINSBURG: But something around 275?

21 MR. SMITH: Around 270.

22 JUSTICE GINSBURG: And the figure, the 250 million
23 is for the rental -- what is that -- what is that for?

24 MR. SMITH: In the Cayuga case, there were two
25 elements of damages. One was retrospective, and that was rental

1 damages for past trespass. The other was a current value,
2 because Judge McKern said that he would not evict anyone, and
3 that he thought a suitable alternative to eviction was the award
4 of value, because it would put the tribe in a position through a
5 free-market and voluntary relationship with purchasers to,
6 quote, "restore its homeland."

7 Judge McKern got really to the heart of this process
8 by recognizing that there are inequities all around, if you
9 will, and that the Court is without the power to extinguish the
10 underlying rights. It's Congress's role, but that there needs
11 to be a sensible way of recognizing those rights today. And
12 what Judge McKern decided is that damages would put the tribe in
13 a position to do what the Oneidas have done with respect to the
14 land that's at issue here before the Court, and that's to make,
15 you know, a fair-and-square deal and pay full value.

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

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

20 JUSTICE SCALIA: That's not the end of it. From
21 what you're saying, I gather that you believe, in that case,
22 once they purchase the land, it becomes tribal.

23 MR. SMITH: Correct. I mean that's the end of that
24 litigation. There is a judgment, it's gone to the Court of
25 Appeals, and it's there now.

1 The issue of damages remedies when the tribe is out
2 of possession is simply conceptually and fundamentally different
3 than the question of what happens when the tribe has joined
4 possession --

5 JUSTICE BREYER: What do you say on the merits,
6 then, to the claim that there were 300,000 of these acres in
7 1838 or with the Treaty of Buffalo Creek -- there were 300,000
8 acres that nobody was paying any attention to because there were
9 no tribe members that lived there, so that when you have
10 language in the treaty, under those circumstances, that says
11 their home is now -- where was it? Illinois or --

12 JUSTICE O'CONNOR: Kansas.

13 JUSTICE BREYER: Kansas. Their home is now in
14 Kansas. That's the nation. That's the place. And that --
15 you've heard the language cited. And even though a person says,
16 "You can live here as long as you want," that just means they
17 can live there as long as they want; that doesn't mean it's the
18 reservation. The reservation's sovereignty may have gone to
19 Kansas, though, of course, nobody had to move, unless he struck
20 a fair bargain that he agreed to with the State of New York. I
21 take it that's their argument. I just want to hear your
22 response.

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

25 JUSTICE BREYER: Yes.

1 MR. SMITH: That argument rests on the idea that
2 there was an assumption, at the time of the Treaty of Buffalo
3 Creek, that the prior transfers were valid. It's an argument of
4 ratification by assumption. Oneida II says, in a much more
5 forceful circumstance, that even a later Federal treaty that
6 explicitly refers to the prior session does not ratify it,
7 because the ratifying language has to be clear and express, and
8 you have to believe that both the Indians and the Congress, the
9 United States, meant to do that.

10 Here, the -- if you think about it, in what I just
11 heard concerning Buffalo Creek, there's an interesting
12 asymmetry. We're supposed to assume that the treaty covered all
13 the land, but we're not supposed to conclude that Ransom
14 Gillet's promises covered it all. We're supposed to believe
15 that one, by assumption, extends to the entire reservation and
16 that the other, forceful promises of a Federal treaty
17 commissioner that you need not go anywhere, are actually very
18 limited and carried with them a thought that they were
19 extinguishing rights in other land. That interaction with
20 Ransom Gillet is crucial. The treaty --

21 JUSTICE KENNEDY: Would it not be odd to have a --
22 to give assurance that you could buy back what you've lost?
23 Does it -- would that -- that's a very strange construction of
24 the representations attendant upon Buffalo Creek. I understand
25 what you're talking about with the 5,000 acres.

1 MR. SMITH: The representations from the Federal
2 treaty commissioner were not that they could buy it back. The
3 Federal treaty commissioner went to the Oneidas because they
4 would not agree to the treaty. They didn't want to give up
5 their rights. He gave them a piece of paper that was meant to
6 assure them they were not giving up their rights. There was no
7 suggestion in this important interaction that they were
8 bargaining over the loss of other rights. Mille Lacs is
9 directly in point here. Mille Lacs, I think -- well, from Mille
10 Lacs, you can derive the proposition that where the record shows
11 no bargaining over a right, and where the treaty does not refer
12 to the right, the Indians will not be held to have silently
13 yielded their important rights.

14 In the nature of this interaction, you have the
15 suggestion that -- you have a far more important right, in much
16 larger part of the reservation, that persisted as a matter of
17 Federal law. There is nothing about what happened at Buffalo
18 Creek that would suggest that anyone would think they were
19 affecting the Oneida's rights in lands that were not involved in
20 the treaty. Now, the treaty --

21 JUSTICE SCALIA: Mr. Stewart, your time is beginning
22 to come up, and there is one thing we haven't talked about that
23 I would really like to get your view on, and that is the 1788
24 Treaty -- what was that, Fort Schuyler -- Treaty of Fort
25 Schuyler?

1 MR. SMITH: Yes.

2 JUSTICE SCALIA: -- between New York State and the
3 Oneidas. Now, that contained language which said the Oneidas
4 cede and grant all their lands to the people of the State of New
5 York. That was the operative provision. Later on, it --
6 Article 2 says, "Of the ceded lands" -- the ceded lands, lands
7 that have been ceded -- "a tract described by metes and bounds
8 is reserved to the Oneidas to hold to themselves and their
9 posterity forever." Now, I would normally interpret that to
10 mean that the Oneidas gave up all of their sovereignty over the
11 lands and were given back, by the State of New York, the right
12 over this tract designated by metes and bounds.

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

24 MR. SMITH: Actually --

25 JUSTICE SCALIA: The New York State police were in

1 there. New York State managed the lands.

2 MR. SMITH: Justice Scalia, actually, it's
3 interesting. In the Joint Appendix in the Court of Appeals, at
4 page 413, is the actual document that governed the transfer of
5 this land, the state statute; and in that statute, the State
6 granted its right of preemption to an individual to acquire the
7 land, because it understood that it had not yet exercised its
8 right of preemption. That's, in the conduct of the parties, a
9 direct refutation of the idea that the right of preemption was
10 exercised in the Treaty of Buffalo -- in the Treaty of Fort
11 Schuyler, the 1788 treaty.

12 The most fundamental point, though, about the 1788
13 treaty is that next came the 1794 Treaty of Canandaigua, which
14 embodied a Federal promise to protect the free use and enjoyment
15 of this land, and the Oneidas' possession of it. And that exact
16 promise -- not sort of, like, but exact -- was held in New York
17 Indians I to prevent taxation of the Senecas' lands.

18 Now, I guess I'd like to make two quick points
19 before I'm out of time.

20 One is that, with respect to the idea that it's just
21 too late, apart from the fact that the question is not
22 presented, I want to emphasize that, in section 2415 of Title
23 28, Congress explicitly focused on the question of these old
24 claims. And if you read the legislative history, all they
25 talked about was how to deal with the Oneida claim and these old

1 claims. And they not only provided that title claims are not
2 barred by statute of limitations, and established a limitations
3 period that would not have run against the Oneidas because they
4 were on a Federal list, but they did the following, which I
5 think is notable. The statute provides that these claims
6 accrued, in 1966, on the day of the statute, there is no room
7 for background equitable principles in Federal law. Where
8 Congress has specifically focused on a problem, addressed it,
9 the idea is, I suppose, that there is no room to fill gaps here
10 by the Court where Congress has decided just what the gaps are
11 and how to fill them.

12 The other point that I would make concerns the
13 Treaty of Buffalo Creek. The treaty's language leaves it to
14 both sides to decide whether or not Indians are going to Kansas.

15 The legislate -- the history of the treaty shows that the
16 United States backed away from any language which would oblige
17 it to remove Indians, and the language with respect to the
18 Indians left them a choice.

19 But, ultimately, all of that is controlled by what
20 happened. The Federal Government made a decision that no
21 Indians would go to Kansas. The idea that Buffalo Creek
22 extinguished reservations in New York would seem bizarre to
23 anyone in New York today, because the Onondagas have
24 reservations, the Senecas have reservations, the St. Regis have
25 reservations, the Tonawandas have reservations, the Tuscaroras

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

13 Thank you.

14 JUSTICE STEVENS: Thank you, Mr. Smith.

15 Mr. Stewart?

16 ORAL ARGUMENT OF MALCOLM L. STEWART

17 FOR UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING RESPONDENTS

19 MR. STEWART: Justice Stevens, and may it please the
20 Court:

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

25 First, if we are correct that the tribe had

1 federally protected title as of the 1790s and that that Federal
2 protection was never validly extinguished, then the fact that
3 the tribe was out of possession of the relevant lands for nearly
4 two centuries is, itself, a distinct and substantial legal
5 wrong, and it would be adding insult to injury to say that
6 precisely because the tribe had suffered that initial injury, it
7 should be 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 that
10 argument at all. I mean, it's just a general rule that, where
11 you've been wronged, you have to come forward, in a timely
12 fashion, to get the wrong righted. And what difference does it
13 make what the nature of the wrong is, whether it's dispossession
14 or not?

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

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

1 land should be analogized to --

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

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

7 JUSTICE O'CONNOR: Yes.

8 MR. STEWART: It's not --

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

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

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

22 MR. STEWART: I think the -- the reservation would
23 remain a reservation. As Mr. Smith pointed out, with respect to
24 parcels within the reservation that are not owned by Indians,
25 the tribe's regulatory authority is extremely limited and,

1 therefore, the tribe would not be able to exercise anything like
2 plenary regulatory jurisdiction over the whole 270,000 acres.

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

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

14 JUSTICE GINSBURG: But now we're talking about land
15 that -- where there are no tribe members, as I understand it, in
16 this area is predominantly non-tribal members.

17 MR. STEWART: I agree. In -- and Atkinson Trading
18 makes clear that, even when the great bulk of the land is owned
19 by the tribe or its members, the tribe's ability to regulate
20 conduct on the non-Indian parcels is sharply limited. That
21 would be doubly true in a tract of this nature.

22 But to return to the point about the State's
23 reliance interest, I think it's -- or the city's reliance
24 interest -- I think it's important to stress that this case is
25 only about taxation, and a municipality can't claim to have the

1 same sort of reliance interest in being able to tax that a
2 potential defendant in a --

3 JUSTICE BREYER: Well, that may be true, but that's
4 why I wondered about the damage part of it. That is, I'm still
5 thinking that a trespass action for trespasses that occurred in
6 1850 or 1700 is worth millions today, even if it's tiny, because
7 of the interest, passage of time, et cetera. When you add that
8 to the value of the land, I'm thinking of numbers that are
9 astronomical. And yet that hasn't happened.

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

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

14 JUSTICE BREYER: And that's why I want to know how,
15 in practice, this works out. Does Congress have the power, for
16 example, to deal with it? Is what we're considering in this
17 case simply a negotiating position and strengthening people's
18 hands, vis a vis legislation? What's going on?

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

23 JUSTICE O'CONNOR: Yes, Congress has done nothing
24 about this, has it? Can -- has the tribe asked,
25 administratively, for the Bureau of Indians Affairs to recognize

1 it now as a tribe?

2 MR. STEWART: Well, the Bureau of Indian Affairs has
3 recognized the tribe all along. That is, under the Treaty of
4 Canandaigua, the Federal Government was required to pay
5 annuities and treaty cloth to the Six Nations, and the Federal
6 Government has done that continuously since the beginning. So
7 we've always recognized this to be a tribe.

8 And I think you're -- you've put your finger on an
9 important point, Justice Breyer, in that the Court, in Oneida
10 II, said that it hoped that Congress would fix the problem, and
11 thought that it would, but said even if Congress doesn't
12 legislate a solution, the suit can go forward. The Court
13 contemplated that equitable considerations could be taken into
14 account in formulating a remedy, but it certainly didn't
15 contemplate that the tribe, at the end of the day, would be left
16 without any remedy at all. And, as you point out, if the tribe
17 can sue for damages, it seems farfetched to think that it
18 wouldn't be able to reassert the tax immunity that --

19 JUSTICE GINSBURG: What tax -- what taxes are we
20 talking about? In addition to property tax, are we also talking
21 about sales tax?

22 MR. STEWART: No, the Court has said -- the Court
23 has said, as a general matter, as a matter of Federal law, a
24 tribal merchant on tribal land can be required to collect sales
25 taxes from non-Indians, at least for the purchase of goods that

1 were manufactured off the reservation.

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

6 MR. STEWART: I mean, taxes are at issue -- are the
7 only thing that's at issue in this case. But I agree that
8 holding this parcel to be a reservation would have implications
9 for regulatory jurisdiction, as well. Now, there isn't a
10 categorical rule of Federal law that says that States and
11 localities absolutely cannot regulate conduct on tribal lands
12 within the reservation. Rather, there is a preemption test --
13 there's certainly a thumb on the scale in favor of an exemption
14 from state and local regulation where tribal reservation lands
15 are involved.

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

21 MR. STEWART: Well, the Court, in the New York
22 Indians II, recognized, to start with, that the treaty effected
23 an immediate session of the Oneida's Wisconsin lands to the
24 Federal Government, and the Court specifically noted that that
25 cession, in and of itself, would be sufficient consideration to

1 support a contract between private parties. So it simply isn't
2 correct to say that the New York Oneidas gave up nothing other
3 than a promise to remove. The second --

4 JUSTICE SOUTER: Was there any positive indication
5 -- I just don't remember this -- in the New York case, that they
6 would -- that they, in fact, had ceded anything of New -- of
7 their interests in New York? As distinct from the Wisconsin
8 lands?

9 MR. STEWART: I mean, there were references to the
10 primary inducement to the Federal Government's entering into the
11 treaty being the desire to --

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

17 MR. STEWART: No. No.

18 JUSTICE SOUTER: Okay.

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

22 JUSTICE SOUTER: But there was no indication that
23 they got Kansas for anything other than Wisconsin, is that
24 correct?

25 MR. STEWART: They got -- I mean, they didn't --

1 they weren't held to have promised -- made a commitment to
2 remove from New York. Now, clearly, in analyzing the reasons --

3 JUSTICE SOUTER: But there was no indication that
4 they had ceded anything with respect to title in New York, was
5 there?

6 MR. STEWART: That's correct.

7 JUSTICE SOUTER: Okay,

8 JUSTICE SCALIA: Well, did it rest upon the cession
9 in Wisconsin?

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

20 The other thing I really wanted to -- the point I
21 wanted to make about the reliance interest of the taxing
22 jurisdiction are that no matter how long a particular tract has
23 been taxable, it is -- may I finish this? -- it is always within
24 the realm of a city's contemplation that it may be bought up
25 tomorrow by the Federal Government, a church, any other

1 tax-exempt entity, and, consequently, the municipality can have
2 no sense of repose that it will remain taxable.

3 Thank you.

4 JUSTICE STEVENS: Thank you, Mr. Stewart. The case
5 is submitted.

6 [Whereupon, at 11:06 a.m., the case in the
7 above-entitled matter was submitted.]

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25