

November 30, 2010

Seth P. Waxman

Honorable William K. Suter
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Re: *Madison County and Oneida County, New York v. Oneida Indian Nation of New York*,
No. 10-72

Dear General Suter:

I am writing to inform you of a recent development in the above-referenced case. The judgments under review are permanent injunctions that prevent petitioners from foreclosing on respondent's land for non-payment of county property taxes. The district court enjoined the foreclosures on account of respondent's sovereign immunity from suit and on three other grounds that were not addressed by the court of appeals. Since certiorari was granted, respondent Oneida Indian Nation (the Nation) has waived its sovereign immunity as to the enforcement of tax liens on its real property. The waiver applies to the pending tax foreclosure proceedings directly at issue in this case and to all future tax foreclosure proceedings involving the Nation's land. It was effectuated through a tribal declaration and ordinance duly enacted by the Council of the Oneida Nation of New York on November 29, 2010. The declaration and ordinance (a copy of which is enclosed) states, in relevant part:

The Nation hereby waives, irrevocably and perpetually, its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States. The Nation does not waive any other rights, challenges or defenses it has with respect to its liability for, or the lawful amount of, real property taxes.

The Nation has taken this step to clarify that, as contemplated by its prior posting of letters of credit covering taxes on all lands at issue in this case, it is prepared to make payment on all taxes that are lawfully due. In view of the foregoing waiver, respondent respectfully suggests that the Court may wish to direct the parties to address how this matter should proceed. Counsel for respondent has informed counsel for petitioners that respondent would not oppose modification of the briefing schedule in order to provide petitioners an opportunity to address this development in their opening brief.

Background

1. In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), this Court held that the Nation could not unilaterally reacquire sovereign authority over its ancient lands through open-market transactions and that such lands therefore did not enjoy tribal

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immunity from taxation. *Id.* at 221. The Court stated that “the proper avenue” for the Nation to reestablish its sovereign authority lay in 25 U.S.C. § 465, which authorizes the Secretary of the Interior to take land into trust for Indians and provides that such lands “shall be exempt from State and local taxation.” *Id.*

Promptly following this Court’s decision in *Sherrill*, respondent applied to have 17,370 acres of its fee lands taken into trust. In May 2008, the Secretary of the Interior granted the application as to 13,003 acres; however, the land has not yet been taken into trust, as petitioners and others have challenged the Secretary’s decision in litigation pending in the Northern District of New York.¹ As part of the trust process, the Department of the Interior directed the Nation to provide irrevocable letters of credit to satisfy outstanding tax liens on the Nation’s land. In relevant part, the letters name petitioners as beneficiaries and provide for payment in full upon a final judicial determination of the amounts due; the letters cover all land at issue in this litigation and are not contingent on any of the land being taken into trust. Respondent intended the letters to provide the necessary security to petitioners so that the disputed issues regarding the amounts due could be judicially determined—and those amounts promptly paid—without regard to the Nation’s tribal sovereign immunity from suit.

Respondent also settled with the City of Sherrill and entered into a compact to govern ongoing relations between the Nation and the City. *See* Second Circuit Joint Appendix A1633-1637.² It has been unable to reach a settlement with petitioners, however, on account of the parties’ substantial disagreements about whether taxes are due at all under state law, whether the Nation is liable for penalties and interest for the period in which the lower courts held that no taxes were due, and over the assessed value of the Nation’s properties. Accordingly, the litigation with Madison County (which began in 2000) continued after *Sherrill*, and the Nation filed a new action against Oneida County, *Oneida Indian Nation v. Oneida County*, No. 05-cv-945 (N.D.N.Y.), in 2005.

2. The district court granted summary judgment to respondent in each of the cases below and permanently enjoined petitioners from foreclosing on the Nation’s lands. The court provided four separate grounds for the injunctions: (i) the Nation enjoys sovereign immunity from suit; (ii) the parcels at issue are subject to the federal statutory restrictions on alienation that apply to Indian land; (iii) the Counties failed to give the notice required under New York law in violation

¹ *See* U.S. Department of the Interior, Bureau of Indian Affairs, Record of Decision: Oneida Indian Nation of New York Fee-to-Trust Request (May 2008); Opp. 4 & n.2. A copy of the Record of Decision is available at www.oneidanationlegal.com/images/news/7.pdf.

² The Nation also reached a settlement with the City of Oneida. Respondent will seek permission to lodge the settlement agreement with the Court at the appropriate time.

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of due process; and (iv) the land in question falls within New York's statutory tax exemptions for land within an Indian reservation, N.Y. Indian Law § 6, and N.Y. Real Prop. Tax Law § 454.³ Pet. App. 41a-46a, 65a-74a. The Second Circuit affirmed the district court's injunctions on the ground that the Nation's sovereign immunity from suit barred the Counties from foreclosing on tribal land. The court of appeals expressly declined to address the remaining three bases for the injunctions. *Id.* at 23a. This Court granted certiorari.⁴

Two weeks after the Second Circuit issued its decision, the New York Court of Appeals decided *Cayuga Indian Nation of New York v. Gould*, 930 N.E. 2d 233 (2010), which held that New York's cigarette tax exemption for sales on "reservation" land applied to lands that, like respondent's, were reacquired within the boundaries of a federally recognized reservation after a long period of dispossession, notwithstanding the lack of sovereign authority over such lands under the reasoning of *Sherrill*. *Id.* at 245, 248-250. The Court of Appeals, however, expressly reserved whether it would reach the same conclusion under the statutory provisions applicable to real property taxes, which were relied upon by the district court in this case as an independent basis for its injunction and which remain a disputed issue of New York law. *Id.* at 251-252.

3. Following *Sherrill*, there is no dispute that the lands at issue in this case are subject to state and local taxation as a matter of federal law. The parties continue to dispute whether the lands are exempt from taxation as a matter of New York state law under the provisions set forth

³ Specifically, New York Indian Law § 6 provides:

No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe, or band occupying the same.

In turn, New York Real Property Tax Law § 454 states:

The real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation and exempt from special ad valorem levies and special assessments to the extent provided in section four hundred ninety of this chapter.

⁴ The petition for certiorari presented two questions for review:

1. whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed taxes.
2. whether the ancient Oneida reservation in New York was disestablished or diminished.

Pet. i. As noted above, the relevance of the second question presented turns on the antecedent question of New York State law whether reservation lands like those at issue here are exempt from taxation.

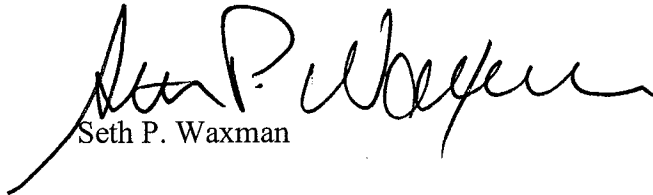
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in footnote 3 above; whether respondents' foreclosure proceedings complied with due process; and whether petitioners should be liable for penalties and interest during the period in which the lower courts held that no taxes were due. Respondent intended the letters of credit issued in connection with its trust application to assure petitioners that any taxes that are ultimately held due would be paid without regard to tribal sovereign immunity. Petitioners, however, have questioned the sufficiency of the letters of credit. Cert. Reply 6-7 & n.2. While respondent believes those letters of credit to be adequate—and to have already removed sovereign immunity as an impediment to payment—respondent seeks to assure petitioners and the Court that it is committed to paying any taxes that are ultimately held to be due once the disputed issues are resolved. The enclosed waiver of sovereign immunity is intended to further reflect that commitment.

Respectfully submitted,



Seth P. Waxman

Encl.

Copies to: David M. Schrauer, Esq.



ONEIDA INDIAN NATION

DECLARATION OF IRREVOCABLE WAIVER OF IMMUNITY

Ordinance No.: O-10-1

TO OUR BROTHERS, on 2 December 1794, here at our homelands of the Oneida Nation, a Treaty was entered into with the United States of America which reflected the unique and special relationship between our governments and recognized the costly and severe wartime sacrifices made by the Oneida people in alliance with the American people in the War of Independence; and

BROTHERS, just one month before, on 11 November 1794, the United States made the Treaty of Canandaigua, the United States' oldest treaty still valid, confirming, among other things, the ongoing government-to-government relationship between the United States and the Nation; and


BROTHERS, the Nation chooses to preserve its sovereignty and also its rights acknowledged by the United States in its treaty relationship with the Nation, and also wishes to promote a peaceful and harmonious relationship with its neighbors today and unto the Seventh Generation; and

BROTHERS, that peaceful and harmonious relationship would be served by removing any controversy or doubt as to the Nation's ongoing commitment to resolve disputes.

NOW, THEREFORE, PURSUANT TO THE AUTHORITY VESTED IN THE NATION BY VIRTUE OF ITS SOVEREIGNTY AND INHERENT POWERS OF SELF GOVERNMENT,

The Nation hereby waives, irrevocably and perpetually, its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States. The Nation does not waive any other rights, challenges or defenses it has with respect to its liability for, or the lawful amount of, real property taxes.

ENACTED THIS 29th DAY OF NOVEMBER, 2010.



Ray Halbritter
Nation Representative