05-6408-cv(L),
06-5168-cv(CON), 06-5515-cv(CON)

United States Court of Appeals

for the

Second Circuit

ONEIDA INDIAN NATION OF NEW YORK,

Plaintiff-Counter-Defendant-Appellee,

– v. –

MADISON COUNTY and ONEIDA COUNTY, NEW YORK,

Defendants-Counterclaimants-Appellants,

BAND OF MOHICAN INDIANS and STOCKBRIDGE-MUNSEE,

Intervenor-Appellants.

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

PETITION FOR REHEARING *EN BANC*

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RULE 35(b)(1) STATEMENT

Defendants-appellants Madison County and Oneida County ("the Counties") petition for rehearing en banc with respect to that part of the panel decision in *Oneida Indian Nation of N.Y. v. Madison County*, No. 05-6408-cv (L), 2011 U.S. App. LEXIS 21210 (2d Cir. October 20, 2011) ("*Oneida II*")[1] (attached) which affirmed the dismissal of the Counties' counterclaims seeking a declaration that the ancient Oneida Nation reservation has been disestablished. *See Oneida II*, at 74-76 (adhering to the prior panel holding on the disestablishment issue); *id.* at 77-78 ¶ 5 (affirming district court's dismissal of the Counties' declaratory counterclaims).

The panel decision in *Oneida II* – to the extent it adhered to another panel's holding (where one Judge dissented) that "the Oneidas' reservation was not disestablished" (*Oneida II*, at 76 (quoting *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003) ("*Sherrill II*")) – conflicts with the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill III*"). It is of "exceptional importance" for this Court to resolve the status of approximately 300,000 acres of land in central New York (450 square miles and 19 times the size of Manhattan) – which encompasses two cities

[1] For ease of reference, the Counties will use the shorthand case names adopted by the Court in its October 20, 2011 panel decision. That panel decision will be referred to as "*Oneida II*." The panel decision issued prior to the remand from the Supreme Court, *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010), is "*Oneida I*."

and over twenty municipal governments and school districts and includes 20,000 landowners. In fact, the Supreme Court itself recognized the exceptional importance of this issue when it granted the Counties' petition for a writ of certiorari last year on this precise issue.[2] The sole reason this issue evaded Supreme Court review was that the Oneida Indian Nation of New York ("OIN") waived its "sovereign immunity to enforcement of real property taxation through foreclosure" a few days before the Counties' Supreme Court merits brief was due. This litigation ploy came after more than *ten years* of litigation in which the OIN asserted that: (1) its recently purchased lands were sovereign Indian lands over which the State and Counties have no taxing authority; and (2) the OIN's immunity from suit prevents the Counties from foreclosing to collect unpaid property taxes. After the OIN's "last minute" abandonment of its sovereign immunity argument, the Supreme Court remanded the case to this Court, and the *Oneida II* panel correctly vacated the district court judgments that granted the OIN summary

[2] As recognized by Chief Judge Jacobs in his dissent from the denial of en banc consideration in *Ricci v. DeStefano*, 530 F.3d 88, 94 (2d Cir. 2008), "[i]f issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits." Judge Jacobs expressed this view in response to an argument that en banc review "should be avoided where it 'would only forestall resolution of issues destined appropriately for Supreme Court consideration'" *Id.* (citing *Landell v. Sorrell*, 406 F.3d 159, 167 (2d Cir. 2005) (Sack, J. and Katzmann, J., concurring)). While the disestablishment issue is not necessarily "destined" for Supreme Court consideration in its current status, the issue is unresolved and is undoubtedly "important enough to warrant Supreme Court review" as evidenced by the Supreme Court's prior certiorari grant.

judgment on the abandoned sovereign immunity claim. The *Sherrill II* panel holding – that a "not disestablished" Oneida reservation exists in central New York – should not be insulated from review by the OIN's litigation tactics. This Court should grant the Counties' petition for a rehearing en banc.

STATEMENT OF THE CASE

This Court should overrule the holding in *Sherrill II* that "the Oneidas' reservation was not disestablished." 337 F.3d at 167. The district court below and a panel of this Court in *Oneida I* and *Oneida II* concluded that they were bound by the panel holding in *Sherrill II* "until such time as [*Sherrill II*] is overruled either by an en banc panel of our Court or by the Supreme Court." *Oneida II*, at 76 (quoted case omitted); *see Oneida I*, 605 F.3d at 157 n.6 ("[o]ur prior holding on this question – that 'the Oneidas' reservation was not disestablished,' – therefore remains the controlling law of this circuit."). The analysis in *Sherrill II* is fundamentally flawed because the panel failed to recognize that the ancient Oneida reservation in New York was disestablished or diminished by the removal of Oneidas from New York, the 1838 Treaty of Buffalo Creek (7 Stat. 550, Jan. 15, 1838), and other developments in the 19th and 20th Centuries.

Prior to the remand from the Supreme Court, the *Oneida I* panel concluded that it "need not reach the Counties' argument that the OIN's reservation has been disestablished" because that panel's conclusion that foreclosure was barred by

tribal sovereign immunity "does not depend on it." *Oneida I*, 605 F.3d at 157 n.6. The *Oneida I* panel nonetheless observed that the Supreme Court in *Sherrill III* had "explicitly declined to resolve the question of whether the Oneida reservation had been 'disestablished'" and then concluded, "[o]ur prior holding on this question—that 'the Oneidas' reservation was not disestablished,'—therefore remains the controlling law of this circuit." *Id.* (quoting *Sherrill II*, 337 F.3d at 167). Thus, the *Oneida I* panel affirmed the *Sherrill II* panel finding on disestablishment even though the Supreme Court in *Sherrill III* cast serious doubt on the *Sherrill II* analysis and reversed its decision. The *Oneida II* panel – from whose decision the Counties seek en banc review – similarly declined to review the disestablishment issue because it too was bound by *Sherrill II*.

En banc review of the disestablishment holding is warranted because it has created – and will continue to create – confusion and jurisdictional conflict. The uncertain status of the ancient Oneida reservation – disestablished, diminished or possibly existing as a kind of "legal fiction" despite having no physical existence in New York for approximately 200 years and no defined boundaries today – continues to be an important issue for the parties and for the State of New York.[3]

[3] New York recognized the importance of this issue and urged this Court to find that the ancient Oneida reservation was disestablished. *See* New York State Letter Brief to the Second Circuit on Remand (dated 1-26-11), at 9 (citing analysis in *Sherrill III* Supreme Court amicus brief, at 2004 WL 1835367).

Uncertainty about the status of the Oneida and other ancient Indian reservations in central New York continues to cause conflict between Indian and non-Indian communities. A decision on this issue by this Court sitting en banc would benefit not only the parties in this case, but also the municipalities and school districts and all landowners in the area; and it would provide much needed guidance to other litigants and courts in New York struggling to determine the status of other former, historic reservations. *See, e.g., Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614 (2010). Historic reservations, such as the Oneida reservation, have not been physically extant for two centuries and involve lands governed and taxed for generations by state and local governments. Based on the historical realities, equitable considerations, and threats of disruption recognized in *Sherrill III*, this Court should overrule *Sherrill II* and reverse *Oneida II*, and declare the ancient Oneida reservation to be disestablished or diminished.

ARGUMENT

THE *SHERRILL II* PANEL DECISION CONFLICTS WITH THE SUPREME COURT'S DECISION IN *SHERRILL III* AND HAS CREATED UNNECESSARY JURISDICTIONAL CONFLICT AND CONFUSION.

I. *Sherrill II*'s Disestablishment Analysis is Inconsistent with the Historical Record and Contrary to the Supreme Court's Analysis in *Sherrill III*.

The disestablishment / diminishment analysis requires consideration of the treaty history of the Oneidas beginning with the 1788 pre-Constitution treaty between New York and the ancient Oneida Indians (the Treaty of Fort Schuyler);

the United States' involvement in subsequent treaties between 1795 and 1846 (including the 1838 Treaty of Buffalo Creek);[4] the historical facts and jurisdictional treatment over a period of more than 200 years; and the practical consequences of finding that the ancient Oneida reservation of 300,000 acres still exists in an area of central New York which has been settled, developed, governed and populated almost exclusively by non-Indians since the 1840s. *See Sherrill III*, 544 U.S. at 203-207, 210-211, 214-220. There has not been an Oneida reservation in New York for generations (except possibly the 32-acre Oneida territory).[5] The Supreme Court recognized these historical facts and the overwhelming non-Indian ownership of, and exclusive State sovereignty over, the area in *Sherrill III*. Specifically, the Court observed that by 1838 the Oneidas had sold all but 5,000 acres of their original reservation; by 1843, they retained less than 1,000 acres.

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[4] The 1978 decision of the Indian Claims Commission (*The Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373) found that the federal government, implementing its "removal policy," actively worked to remove the Oneidas, and other New York Indians, from New York State, beginning in the early 1800s. *See* Counties' Supreme Court Merits Brief, at 31-32, 39-41 (2010 U.S. S.Ct. Briefs LEXIS 2323 (Dec. 3, 2010)).

[5] This 32-acre Oneida territory was recognized by the 2000 Census Map. As discussed in Section IV *infra*, the OIN persuaded the Census Bureau to amend its 2011 Census Map to show an approximately 308,000-acre reservation in Madison, Oneida and Lewis Counties. This mapping change was done without any notice to the Counties. In January 2011, Madison County requested documents submitted to the Census Bureau for the mapping change. To date, the Census Bureau has refused to provide the documents and the Counties have filed a FOIA appeal. The OIN census dispute maps can be found on Madison County's website at http://www.madisoncounty.org/Cendispmaps.php.

And by 1920, only 32 acres continued to be held by the Oneidas. *Id.* at 206-207. The Supreme Court also noted the long history of State sovereign control from the early 1800s, and that for the past two centuries New York and its county and municipal units have continuously governed the area. *Id.* at 214-217.

When read in historical context, the 1838 Treaty of Buffalo Creek represents a further step in implementing the longstanding federal (and state) policy to remove Indians from New York, with federal agents negotiating the Treaty with the New York Indians, including the Oneidas. The language of the Treaty is clear. Article 2 states that "[i]t is **understood** and **agreed** that the [Indian country in the West] is **intended** as a future home for the [New York] tribes," including the Oneidas. (emphasis added.) This is a clear statement of the intention of the federal government. Article 5 says "[t]he Oneidas are to have their lands in the Indian Territory. . ." And Article 4 provides that that is where the New York Indians will have their new homes and establish their government. In Article 13, the Oneidas "agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." The words "diminishment" and "disestablishment" are not used, but these words were not terms of art in Indian law in 1838. *See Solem v. Bartlett*, 465 U.S. 463, 476 n.17 (1984) ("In 1908, 'diminished' was not yet a term of art in Indian law.").

New York was not a party to the Treaty. The federal government knew it had no right to buy the Oneida lands which were in New York, under New York's jurisdiction, and subject to New York's right of preemption. This explains why the Treaty does not include words of cession or a specific price to be paid for the Oneida lands. *Compare with Sherrill II*, 337 F.3d at 161 ("Nothing in its [the Treaty of Buffalo Creek] text provides 'substantial and compelling' evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation. There is no specific cession language, and no fixed-sum payment for opened land in New York; rather there is only the possibility of a sale for 'uncertain future proceeds.'"). The federal government intended the remaining Oneidas to remove from New York, to sell their remaining lands to New York, and to establish their reservation in the Indian territory. The Oneidas agreed to sell their remaining lands and remove from New York, and within a few years substantially did. *See Sherrill II* Dissenting Opinion, 337 F.3d at 172-73 (Van Graafeiland, J.) (no Oneida reservation).

Contrary to the *Sherrill II* panel's conclusion, the record shows in the first five years after the Treaty the Oneidas sold 80% of their remaining lands to New York; and by 1845, two-thirds of the remaining Oneidas removed from New York, resettling in Wisconsin and Canada and establishing new homes and governments there. The rest of their lands were sold during the 1800's (except possibly the 32

acres), and the former reservation was further settled and developed by non-Indians. By the late 19th or early 20th Century, the federal government stated that the Oneidas were known no more as a tribe in the State of New York. The Department of the Interior's treatise on Federal Indian Law makes this clear in the 1941 and 1958 editions. *See* F. Cohen, Handbook of Federal Indian Law, 416 n1, 417 (1941); 966 n1, 967 (1958).

As previously noted, the Supreme Court in *Sherrill III* rejected the OIN's claims of sovereign immunity from foreclosure and eviction without reaching the issue of disestablishment. *Sherrill III*, 544 U.S. at 215 n. 9 ("This Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation."). *Sherrill III* not only reversed on the specific question presented, but also set forth findings of historical fact that directly contradict the findings made by the *Sherrill II* panel, thereby casting substantial doubt on that panel's disestablishment analysis. Moreover, the Supreme Court's decision to grant certiorari on the disestablishment / diminishment question last year reinforces the doubt cast by *Sherrill III*. Notably, the Supreme Court in *Sherrill III* repeatedly referred to the Oneida reservation in the past tense, using the adjectives "ancient", "historic" and "former" (544 U.S. at 202-203, 213, 215, 221) while observing "the longstanding, distinctly non-Indian character of the area and its inhabitants[.]" *Id.* at 202. *Sherrill III* also found as a

matter of historic fact and current reality that the area of the ancient reservation has not been treated as an Indian reservation by the federal,[6] state or local governments for nearly two centuries and has been settled, developed, governed and taxed by state and local governments (with U.S. acquiescence) since the early 1800s.

The *Sherrill II* panel, however, took a different view of the Oneidas' history in New York – without the benefit of the Supreme Court's decision in *Sherrill III* – and concluded that the 1838 Treaty of Buffalo Creek neither diminished nor disestablished the Oneida Reservation in New York. *Sherrill II*, 337 F.3d at 160-65. But, a fair reading of the historical record before and after 1838 resonates with the Supreme Court's findings in *Sherrill III* and supports the conclusion that the federal government intended in the Treaty of Buffalo Creek to diminish or disestablish the Oneidas' reservation in New York.

A core characteristic of an Indian reservation is the right of the tribe to exercise sovereignty over the land. *See United States v. Mazurie*, 419 U.S. 544,

[6] The U.S. did not set aside the area for the Oneidas and has never superintended it as an Indian reservation. The federal government's recent position that the ancient Oneida reservation is "not disestablished" was adopted only after it intervened in the late 1990s in the now-dismissed Oneida land claim. 18th and 19th Century Oneida land sale treaties were approved or authorized by the United States. Then, there was no distinction between ownership and reservation status and the federal government still dealt with Indian tribes by treaty despite the 20th Century rule that only Congress can disestablish a reservation. The Supreme Court has also recognized *de facto* disestablishment or diminishment. *See Sherrill III*, 544 U.S. at 215-221.

557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."). *Sherrill III* determined that the OIN has no sovereignty over the land which *Sherrill II* concluded was within a "not disestablished" OIN reservation. This anomalous result is confusing and will create disruption, instability, uncertainty and new litigation for the community – Indians and non-Indians alike.[7]

II. ***Sherrill II*'s Holding of a "Not Disestablished" Oneida Reservation has Consequences for Pending and Future Litigation and Governmental Decisions.**

Unless this Court addresses and correctly resolves the disestablishment issue, questions concerning the legal status of the 300,000-plus acre ancient Oneida reservation (and the contours thereof) will inevitably arise in subsequent litigation, boundary disputes, and land-into-trust applications.[8] Because the application of so many federal and state laws turns on the existence and location of reservation

[7] The "not disestablished" Oneida reservation in New York has no physical form or boundaries. The present-day boundaries of a "not disestablished" reservation are unclear and the district court did not define them. *See Oneida Indian Nation of N.Y. v. Madison County*, 235 F.R.D. 559, 561 (N.D.N.Y. 2006).

[8] The Indian Reorganization Act authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The OIN has asked the Secretary of the Interior to take land it owns in the Counties into trust. *See infra* Section III.

boundaries – including the definition of "Indian country"[9] itself – the issue should be revisited by this Court en banc in a manner consistent with the historical record and present reality to resolve the continuing jurisdictional chaos and conflict. *See generally Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2286 (2009) (reaching issue because "deciding the matter now will reduce the likelihood of further litigation"). In the judicial proceedings below, the OIN has argued that the existence of a "not disestablished" reservation: (1) rendered the area Indian Country within the meaning of 18 U.S.C. § 1151; (2) subjected its fee lands to the restrictions of the Indian Trade and Intercourse Act; and (3) made lands not recognized as an Indian reservation by New York for 150 years or more an Indian reservation for the purpose of state-law tax exemptions.

Although vacated by this Court in *Oneida II*, the district court below held in the alternative that the disputed lands are immune from taxation under New York statutes conferring immunity on any tribally owned real property "in [an] Indian reservation," and that the original reservation boundaries had never been disestablished or diminished. *See Oneida Indian Nation of N.Y. v. Madison*

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[9] 18 U.S.C. § 1151(a) ("Indian country" includes "all land within the limits of any Indian reservation" under federal jurisdiction); *see also Cayuga*, 14 N.Y.3d at 638-43 (holding that the 18th Century Cayuga Reservation is a "qualified reservation" for purposes of New York Tax Law even though the tribe has held no trust lands within that area since the Jefferson Administration (1807)), *cert. denied*, 131 S. Ct. 353 (2010).

County, 401 F. Supp. 2d 219, 231 (N.D.N.Y. 2005) (applying N.Y. Real Prop. Tax Law § 454 and N.Y. Indian Law § 6). The *Oneida II* panel remanded this issue to the district court and ordered it not to exercise supplemental jurisdiction over these state law claims and to dismiss without prejudice to their being brought in state court. *See Oneida II*, at 77. Immediately after the *Oneida II* panel decision was released, the OIN indicated that it would continue to litigate and "promptly present this remaining issue to a state court for a final resolution."[10] Although a New York state court, in analyzing whether the OIN lands qualify for tax-exempt status under state law, is not bound by *Sherrill II*'s determination that a "not disestablished" reservation exists, the OIN will nevertheless rely on *Sherrill II*'s finding in subsequent state court proceedings.

III. ***Sherrill II*'s Impact on Land-Into-Trust Applications.**

Sherrill II also has consequences for land-into-trust applications. Within days of the Supreme Court ruling in *Sherrill III*, the OIN asked the Secretary of the Interior ("the Secretary") to take into trust all 17,370 checker-boarded acres of fee lands it owned in the Counties. At the same time, and continuing to the present, the OIN has persisted in its refusal to pay delinquent property taxes on hundreds of

[10] *See* Oneida Nation Statement Regarding the Second Circuit Ruling Today in Foreclosure Case - 10/20/11, *available at* http://www.oneidaindiannation.com/pressroom/releases/Oneida-Nation-Statement-RE-Second-Circuit-Ruling-Today-in-Foreclosure-Case---102011-132251833.html.

recently-purchased properties that, like those in *Sherrill*, had been owned and governed by non-Indians for approximately 200 years and subject to state and local taxation for generations. The Secretary ultimately decided to take approximately 13,000 acres into trust in a Record of Decision dated May 22, 2008 ("ROD") which is currently being challenged in an action pending in the Northern District of New York. *See, e.g.*, *New York v. Salazar*, No. 08-cv-644 (N.D.N.Y., filed June 19, 2008).[11] The ROD stated that the Department of Interior ("DOI") considered the application to be an "on-reservation" application, and thus, evaluated it under the regulatory provision more favorable to a tribe's land-into-trust application (*see* 25 C.F.R. § 151.10), rather than the provision that applies to "off-reservation" land acquisitions (*see* 25 C.F.R. § 151.11). *See* ROD at 32.[12] The Counties have challenged this aspect of the Secretary's determination (among others).[13] *Sherrill II*'s determination is also inconsistent with the 25 C.F.R. § 151.2(f) definition of "reservation" used by DOI in the ROD which refers to the tribe "as having

[11] As a result of this lawsuit, none of the parcels have been taken into trust.

[12] There are several material distinctions between 25 C.F.R. § 151.10 (on reservation) and 25 C.F.R. § 151.11 (off reservation). For example, under § 151.11(b), the Secretary of the Interior shall give greater weight to the concerns raised by state and local government regarding potential impacts on regulatory jurisdiction, real property taxes and special assessments.

[13] *See New York v. Salazar*, No. 08-cv-644 (Plaintiffs' Second Amended and Supplemental Complaint at ¶ 177-184 (sixth cause of action) (Document 94)).

governmental jurisdiction" over the land. Under *Sherrill III*, the OIN does not have "governmental jurisdiction" over the lands it seeks to have taken into trust.

IV. ***Sherrill II*'s Impact on New York State Census Maps.**

Finally, *Sherrill II* has apparently impacted New York's Census Maps. The OIN recently persuaded the Census Bureau to amend Census Maps to show an approximately 308,000-acre extant OIN reservation in Madison and Oneida (and Lewis) Counties – instead of the tribe's actual 32-acre territory which had been noted on prior Census maps. *See supra* note 5. The expanded reservation map "swallows half of Madison County," as reported in the Syracuse Post Standard. *See Oneida Nation Swallows Half of Madison County with Map Change*, Syracuse Post-Standard, Jan. 20, 2011 at A-1; *see also* Glenn Coin, *Map dumbfounds Madison County*, Syracuse Post-Standard, Jan. 20, 2011, at A-3. Simply put, the OIN's claim to an existing 300,000-acre reservation cannot be reconciled with *Sherrill III*'s holding that the OIN exercises no sovereignty over this land, or with this Court's holding in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert denied* 2011 U.S. LEXIS 7494, 2011 U.S. LEXIS 7567 (Oct. 17, 2011) dismissing the Oneida land claim.

CONCLUSION

This Court should grant the Counties' petition for a rehearing en banc.

November 3, 2011

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